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PART THE THIRD.

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DIVISION THE SECOND.

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LECTURE XLII.

*Of real actions.*

**H**AVING in the last preceding lectures treated of the modes of criminal prosecutions, all of which (or all except *appeals*) are the means of vindicating the *public* justice of the kingdom, I proceed now to the second title intended to be discussed in this last part of our course of lectures, viz. *private civil actions in the courts of common law*; which are suits carried on in those courts for obtaining private rights, and redressing private injuries. I use the expression of private civil actions, in order to exclude as well writs of appeal, before spoken of as a mode of prosecuting crimes, as also in exclusion of

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suits in equity, which will be the final subjects of discussion.

Private civil actions then are divided into real, mixed, and personal.

Real actions, of which I have been heretofore necessitated to make some mention, are such, in which real estates of inheritance or for life are demanded. Of which<sup>a</sup> real actions there are two sorts, viz. *possessory*, which are grounded on the possession and seisin of the demandant himself, and *auncestrel*, in which the title is derived from the ancestor. There are two sorts also of real actions auncestrel, one called *auncestrel possessory*, where the ancestor died seised, and the land descended from him, the other called *auncestrel droiturel*, where nothing descended from the ancestor but a naked right.

For I have<sup>b</sup> heretofore distinguished between rights of entry, where the owner of lands may, or formerly might, regain them by entry merely, and rights of action, where he cannot otherwise recover his estate, but

<sup>a</sup> 6 Co. 3. a. b.

<sup>b</sup> Vol. II. 170, 1.

by suit and judgment at law. Rights of action are also properly distinguishable into two kinds, first, where the estate is divested, displaced, discontinued, and turned to a mere or naked right; secondly, where altho the claimant has no right of entry into the lands, yet he hath a sort of ideal seisin, not yet faded into a mere right. In the former case the remedies are a writ of right, a *quod ei deforceat*, and a *formedon*.

I. The founders of our law were diligently exact in framing real actions adapted to every emergency. Of writs of right only there were several kinds; of which the most usual was the writ of right patent. Writs<sup>c</sup> of right are said to be of the highest nature, because the determination upon them is final; they may be used, where other remedies have failed; and they can only be sued for lands and tenements claimed in fee simple, not those claimed in fee tail, or for life. A man<sup>d</sup> may sue a writ of right for lands of his own purchase or acquisition, which he claims, as devisee or otherwise, *esse jus et hæreditatem*

<sup>c</sup> F. N. B. 1.

<sup>d</sup> Plowd. 58. Of this kind is the precedent in 3 Bl. comm. app. n<sup>o</sup> 1.

*suam*: where the word "*inheritance*" has a prospect to future heirs by descent from such claimant, and does not imply that the estate was by him inherited from his ancestors. But a little attention will shew, that the necessity of bringing a writ of right must almost always happen, where the inheritance claimed is derived by hereditary transmission, and not where the demandant himself was ever seised of the lands in question.

Writs of right, of late years, have had a kind of revival, and restoration to practical experience. It was but in the twelfth year of the present reign that this form of action was renewed, after, I believe, a long interval; which example however has been repeatedly followed. The question thus then adduced

\* 3 Will. 419, 420. 541—564. The original writ expressed, that the demandant claimed the lands to hold of the king in *capite*, and it was returnable in the common pleas; yet it was called a writ of right patent, tho antiently a writ of right close, or *præcipe in capite*, was the form. (F. N. B. 10.) The writ was dated the 20th of Nov. in the 12th year of the present reign. The next thing was to summon the defendant; to which effect proclamation was made on Sunday the 29th of Dec. after divine service and sermon, at the most usual door of his parish church. The defendant not appearing, a *grand cape*, dated the 12th of Feb. following, issued, commanding the sheriff to take into the king's hands the premises in question, as a farther means or process of compelling an appearance; which was hereby produced; whereupon the demandant's *count*, or state of his case, was entered on record.

to trial was, whether a conveyance by a lord of a manor of part of the waste, made above sixty years before in consequence of a manorial presentment, was a grant in fee, or only a lease for years. The *count* described a title of the auncestrel droiturel kind, suggesting, that the father of the demandant was within sixty years (according to the <sup>f</sup> statute of limitations) seised of the tenements by taking the esplees (or profits) thereof, from whom the *right* (not the lands, tenements, or the like) descended to the claimant. The plaintiff in this action we see is called the demandant, and the defendant is stiled the tenant, and must be a person claiming or seised of a freehold interest. To the demandant's count the tenant <sup>s</sup> *defended*, that is denied his adversary's right; and put himself upon *the grand assize*; accordingly *the mise* was joined on the mere right; which phrases will be explained as I proceed.

<sup>f</sup> 32 H. VIII. c. 2. § 1. In a writ of right, on the demandant's own seisin, the time of limitation is thirty years. (Same st. § 3. 1 Bul. 162.)

<sup>s</sup> The tenant also pleaded another plea, viz. a fine with proclamations and non-claim. But the court inclining to think, that upon the mise joined on the mere right every thing might be given in evidence except collateral warranty, it was consented to strike out such second plea. (3 Will. 420.)

Here it must be observed, that the tenant perhaps needed not to have put himself on the grand assize. For according to sir William<sup>b</sup> Blackstone the trial by *battel* may still be legally

<sup>b</sup> 3 Black. comm. 337. 341.—But tho this is confidently repeated in the cited places, I must think it at least very questionable, whether the court of common pleas would now award the trial by *battel*, or would not rather consider it as “sufficiently” abrogated by disuse. (21 Vin. abr. 33.) Indeed in 14 C. I. *battel* being waged and accepted in a writ of right at Durham, the judge examined the champions, whether they were not hired, who confessed, they were; which confession he caused to be recorded, and gave farther day to be advised. By the king’s command all the judges were to deliver their opinions, whether this were cause to *deraign* the *battel* by these champions. Accordingly most of the judges subscribed their opinion, that this exception coming after the *battel* gaged, and champions allowed, and sureties given to perform it, ought not to be received. (3 Cro. 522.) This case therefore may be thought to countenance the trial by *battel* at that time, tho what afterwards became of it does not appear. But as to the famous instance in 1571, of which sir William Blackstone recites the ceremonial from Dyer and Spelman, (the latter of whom is very particular) it is remarkable, that the *battel* was interdicted by command of queen Elizabeth, *cædem exhorrentis*, and the controverfy compromised: tho for the security of the tenant, the formalities were continued, and the suit went on to judgment. (Spelm. gl. 103.) Yet even so far back these formalities were not fully settled, or not accurately known. For (among other omissions) nothing is said of 1 *d.* put in each finger-stall, making 5 *d.* in each gauntlet; which matter is very gravely insisted on, and repeatedly mentioned, in the trial by *battel* awarded in 1422, in a writ of right brought by Peter C. knt. against Henry Percy, earl of N. (Yearb. 1 H. VI. 6. b. 7. a. b.) In which case the champions were solemnly enjoined to repair, one to St. Paul’s, the other to Westminster Abbey, to pray God to give the victory to him, who had right to the land: but there is a “*quære de cē commandement.*” Judgment was given, by default of the

legally insisted on, which was the only method of decision for about a century after the Norman invasion, and which gradually fell into disuse. In this<sup>1</sup> singular proceeding the demandant and tenant could not fight for themselves; because if either of them were<sup>k</sup> slain, the suit would be abated, and no judgment could be given. The ferocity of the times, and the romantic thirst of being signalised by feats of hardiness<sup>l</sup>, must chiefly account for the ease, with which substituted champions were procured. But surely these forensic tournaments were still more deserving of discouragement than even the trial by<sup>m</sup> ordeal

the tenant, that the said P. C. knt. recover, &c. and the earl in mercy, &c. because he is an earl and peer of the realm he shall be amerced by his peers according to the statute, viz. mag. car. c. 14.

<sup>1</sup> Booth's real actions, 100.

<sup>k</sup> In criminal trials by battel, if the appellee were cast to the ground, and would fight again, he was to be replaced in the same disadvantageous plight: (Yearb. 19 H. VI. 25. a. b. where both appellor and appellee were sentenced to be hanged.) and at such barbarisms, learned judges presided!

<sup>l</sup> For it seems to have been a disqualifying exception to the champions, that they were hired for money, if made in due time. (3 Cro. 522.)

<sup>m</sup> Sir William Blackstone justly exclaims on the folly and impiety of pronouncing a man guilty, unless he was cleared by a miracle. But he does not specify a gross inequality and inconsistency, which prevailed. For in one species of water ordeal, and in purgation by the *corfued*, the converse obtained:

ordeal in criminal prosecutions. For if we suppose the event to depend on the accidental procuring of a more puissant champion, or other matter of chance, this is a sufficient condemnation. And if we consider all these extraneous modes of trial as appeals to the Supreme Being, it is more reasonable to expect an immediate interposition of Providence, in favor of accused innocence, than for the purpose of deciding, whether a disseisin was of sixty years standing, on whom a warranty is binding, and the like arbitrary refinements of instituted law, which govern the determination in writs of right,

However in the case above alluded to, the tenant did not insist on this antique mode of trial, but put himself on the grand assize. The consequence of this was that there issued a writ of summons of four knights, girt with swords, to elect the grand assize. On which nothing being done, an *alias writ of summons* issued to the same effect. By virtue whereof four knights were summoned by

the culprit was presumed innocent, unless his guilt was miraculously evinced; viz. unless he floated on the water, without using the efforts of swimming, or was choaked or convulsed in attempting to swallow a small morsel of cheese or bread. (4 Black. comm. 337, 8, 9.)

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the sheriff, and appearing in court were sworn to choose twelve <sup>a</sup> knights, girt with swords, of themselves and others, which best knew and would declare or say the truth between the parties. The four knights accordingly elected of themselves and others twenty-four, sixteen of whom constituted and were sworn upon the jury, which thus formed the grand assize. The four knights, electors of the rest, must be <sup>b</sup> *challenged*, if at all, on their appearance, and before they are sworn. The other jurors must be challenged, as soon as they are elected.

The trial was necessarily had in term time, before all the judges of the common pleas. The counsel for the tenant began <sup>c</sup>, and stated his case, and attempted to confirm it by evidence: then the counsel for the demandant went into his case and evidence. The chief justice, in his directions to the grand assize, told them, they were to deter-

<sup>a</sup> Booth 97.

<sup>b</sup> That is, objected to as unfit to serve on the jury. (Mo. 67.) In the case referred to it was said to be a good cause of challenge, if the four knights were not girt with swords, according to the requisition of the writ, and the court ordered them to go and return armed accordingly.

<sup>c</sup> Mo. 762.

mine the question as to the mere right between the parties, upon which the *mise* or issue is in this action joined, without regarding the seisin of the tenant, or those from whom he claimed, for any time less than sixty years next before the day of suing the demandant's writ of right. For if the tenant, or those under whom he claimed, had been wrongfully seised in possession for less time than sixty years, that was not to bar the demandant of his right. The verdict upon the evidence was, that the demandant had greater title to hold the tenements with the appurtenances to him and his heirs, than the tenant to hold the same as he then held them; which was the form of language, in which the *mise* had been joined: for the<sup>a</sup> jury cannot find a special verdict in a writ of right. The<sup>r</sup> judgment consequently awarded and entered hereupon was that the demandant recover his seisin against the tenant of the tenements aforesaid, with the appurtenances, to hold to him and his heirs, quit of the tenant and his heirs for ever.

<sup>a</sup> Mo. 762.

<sup>r</sup> If judgment be for the tenant, by verdict, or by default of the demandant, it is entered, that the tenant hold the land to him and his heirs quit of the demandant and his heirs for ever. (1 Inst. 295. b. Plowd. 357. 1 Bul. 160.)

A writ of right may be brought of certain incorporeal hereditaments, as of a rent; which Sir Matthew Hale says, must be understood of a rent service, for of a rent charge or seck no writ of right lies. There may also be brought a writ of right of advowson, where a stranger has presented to a church, and his clerk is instituted; but it seems, in such case, unnecessary to resort to this method, since it hath been<sup>u</sup> enacted, that such usurpation shall not turn the right of patronage to a mere right, and that the lawful patron may present on the next avoidance, or maintain an action of *quare impedit* in case of a disturbance. The writ of *juris utrum*, which was a kind of writ of right for a parson or prebendary, the lands and tenements of whose preferments had been aliened by their predecessors, is now of no use, except where the wrongful possession began during the present incumbency, and has continued above twenty years.

\* F. N. B. 12, 13. Hal. ad loc.

† Booth 121.

<sup>u</sup> St. 7 A. c. 18.

\* Booth 221.

Where

Where<sup>r</sup> land is holden of an intermediate lord, and lying within some feignory, the tenants whereof owe suit to the feudal lord, his rural court is the regular jurisdiction for instituting this mode of trying the title to such real property. But it may be sued for in the common pleas, by *licence* of the feudal lord; in which case the removal of the cause thither expressly specifies this reason, "*quia dominus remisit curiam.*"

If the<sup>r</sup> lands be holden of a manor, which manor is holden in *antient demesne*, they are to be sued for by a writ called a *writ of right close*, directed to the lord of antient demesne, commanding him to do right in his court; but the suitors there are the judges.

Another distinct<sup>r</sup> head or title is that of *writs of right patent in London*; which seem to have nothing particularly appropriate to them, except that they are directed to the mayor and sheriffs, commanding, "*quod sine dilacione plenum rectum teneatis.*" And similar writs may issue to any *other* city or bo-

<sup>r</sup> F. N. B. 5, 6. — See as to Durham 1 Bul. 160.

<sup>2</sup> F. N. B. 23. 6 Co. 11. b. Sal. 341. 3 Leon. 63, 64.  
See Burr. 1047, 8.

<sup>3</sup> F. N. B. 12, 13.

rough, where there are tenements of bur-  
gage tenure, and a competent jurisdiction.

There <sup>b</sup> is another writ of right, which  
lieth between parceners by the common law,  
as heirs female and their heirs, and also be-  
tween parceners by the custom of gavel-  
kind. Thus if an ancestor, seised in fee sim-  
ple, lease his lands for term of life, and die  
having issue two daughters, and afterwards  
the tenant for life die, and one daughter en-  
ter into the whole land, and *deforce* her  
sister, the sister so deforced may maintain a  
writ of right *de rationabili parte*.

There is still another <sup>c</sup> writ, which has  
obtained the name of a writ of right, tho  
very improperly, because its claim is always  
confined to an estate for life of the demand-  
ant, called the writ of right of dower. This  
writ may, it seems, be brought, where no  
dower at all hath been assigned, in which  
case a writ of dower *unde nihil habet*, (ano-  
ther real action) also lies, or it may be sued,  
where the claimant enjoys parcel of her  
dower, and demands the residue.

<sup>b</sup> F. N. B. 19.

<sup>c</sup> F. N. B. 16, 17.

The proper tribunal of decision on writs of right is the court of common pleas. If the <sup>d</sup> proceedings were commenced before any territorial jurisdiction, and the tenant put himself on the grand assize, this (as well as several others) was a sufficient cause for <sup>e</sup> removing the suit before the superior judicature.

The modern itinerant justices have not, by virtue of their commission of *assize*, power to try writs of right. For that commission (*viz.* to take assizes, juries, and certificates, before whatsoever justices arraigned, &c.) does not include these higher writs of the *droiturel* kind. There have been however some late instances of the *nisi prius* process issuing to adduce writs of right, where the mise has been joined in the common pleas, to trial on the circuits. I understand these cases were by consent or without opposition; and that a doubt was conceived on the strict re-

<sup>d</sup> F. N. B. 8.

<sup>e</sup> The demandant may remove the suit from the lord's court to that of the sheriff, and from thence into the common pleas. But if the suit be removed at the instance of the tenant, it is doubtful, whether it ought not to go immediately to the common pleas, passing by the county court. (F. N. B. 7, 8.)

gularity,

gularity of such practice, perhaps from the words of the <sup>f</sup> statute of York, which, empowering judges of *nisi prius* to record nonsuits, is declared not to extend to *grant* or great assizes. But there is great strength of <sup>g</sup> antient authorities to establish the practice alluded to.

II. I am secondly to mention among this class of actions a writ in another form, called a *quod ei deforceat*; which resembles a writ of right in as much as it is brought to try the mere right of ownership, where the seisin of the demandant is so divested as to preclude him from succeeding in a possessory action. But the difference is that it may be brought to recover seisin of a less estate than in fee: which is not the case of the genuine writ of right patent; altho the writ of right of dower has obtained that name, and altho likewise <sup>h</sup> a writ of right close in antient demesne before mentioned may, it is said, be brought for lands or tenements claimed in

<sup>f</sup> 12 E. II. c. 4. 12 Mod. 651.

<sup>g</sup> Jenk. 38. Bro. t. *droit de recto* pl. 28. t. *nisi prius* pl. 16, 17. & 24, where it is added, "*quod nota bene.*"

<sup>h</sup> F. N. B. 23.

fee tail, for life, or in dower, as well as those demanded in fee.

The chief, if<sup>i</sup> not the only, use of a *quod ei deforceat* is where tenant in tail, in dower, by the curtesy, or generally for life, lose their lands by default in a *præcipe quod reddat*, having had a regular summons. This<sup>k</sup> is their only remedy, and was introduced by a<sup>l</sup> very antient statute, before which they were in such case destitute of redress. It was proper<sup>m</sup> that the remedy should be extended to tenants in tail, because in this same parliament their estate was changed from a fee simple conditional to that new species which acquired its present denomination of estates tail, and consequently they were no longer intitled to a writ of right; and if<sup>n</sup> they had brought a *formedon*, the former recovery might be pleaded in bar; so that would not effectuate their purpose.

<sup>i</sup> See W. Jon. 380, 1. The stat. of Rutl. 10 E. I. seems not to this purpose.—If this be the only use of the writ, the limitation must be thirty years. (St. 32 H. VIII. c. 2. § 3.)

<sup>k</sup> F. N. B. 364.

<sup>l</sup> West. 2. 13 E. I. c. 4.

<sup>m</sup> 2 Inst. 350.

<sup>n</sup> Noy 1.

III. Of these actions, necessary to be brought where the estate of the claimant is turned to a mere right, the only remaining one of which I purpose to treat, is that called a *formedon*, tho there are others of less frequent occurrence and less extensive use. Indeed *formedons* also are now very rare, but still there are occasions, in which they are the only means of recovering seisin of an estate. This action is grounded on the <sup>o</sup> statute *de donis*, which prescribes the form of the writ; and it lies <sup>p</sup>, where a tenant in tail aliens, or is disseised of, the lands in question; here the issue in tail has but a mere right; in case the estate is absolutely *discontinued*; and he is therefore put to his *formedon*; which in this instance is called a *formedon in the descender*. The same <sup>a</sup> remedy lies to recover lands intailed, of the nature of borough English, for the youngest son, who is then heir in tail *according to the custom*. In *formedon in the descender* the demandant must make himself heir to the donee, and also to the person last seised by force of the intail: and all those

<sup>o</sup> Westm. 2. 13 E. I. c. 1.

<sup>p</sup> F. N. B. 486.

<sup>a</sup> Hal. ibid.

<sup>r</sup> 8 Co. 88. b. F. N. B. 488.

ought to be mentioned in the pedigree, who were actually seised, or to whom the transmissible right descended, "by force of the intail; and they ought to be named "son and heir," "brother and heir," and the like.

There is likewise an action called a *formedon in the remainder*, which is maintainable, where lands are given for life or in tail, with remainder in tail or in fee, and a stranger *intrudes* upon him in the remainder, and keeps him out of possession, after the death of the particular tenant without inheritable issue. This is the particular instance alleged by sir William Blackstone<sup>a</sup>; but<sup>c</sup> the formedon in the remainder is also to be used in case of *alienation* by the tenant in tail, under the above circumstances, which is a more probable event. It may<sup>b</sup> be brought too by a remote remainderman; and then all the mesne or precedent remainders ought to be mentioned.

Tho it was long, before a tenant in tail had complete power of alienation by pursuing any course, still a feoffment made by him had

<sup>a</sup> Comm. b. iii. c. 10.

<sup>c</sup> F. N. B. 499.

<sup>b</sup> 8 Co. 88. a.

great operation in the law, working a *discontinuance*, as it is called, of the estate tail. When <sup>x</sup> this was the case, the formedon of the remainderman expressed, that *the right remained*, if otherwise, then that *the tenements remained*, *remansit jus*, or *tenementa prædicta remanserunt*: which was not a nugatory distinction, but serves to shew the diligent exactness of the law, in estimating the kinds and degrees of seisin or of interest, that might be had in real property.

If the <sup>y</sup> remainder had been executed, and the ancestor were seised of the very estate, and not simply intitled to the remainder, the claimant in the *formedon* must say, that the estate ought to *descend*, and not that it ought to *remain*. But no writ shall say, that the substance of the thing ought to descend, unless the ancestor had a seisin.

There is a <sup>z</sup> third kind of *formedon*, called a *formedon in the reverter*; which lies, where there is a gift in tail, and a failure of issue of the donee inheritable *secundum formam doni*;

<sup>x</sup> 8 Co. 86. a.

<sup>y</sup> 8 Co. 88. a. 89. a.

<sup>z</sup> F. N. B. 503.

in such case the reversioner shall have this action to recover the land; and if he have granted away his reversion, his grantee shall have the same remedy. A <sup>a</sup> *formedon in the reverter*, brought as heir of the donor, must deduce a regular pedigree from him; but there is no need of the same exactness in stating the inheritable line of the donees. However the <sup>b</sup> *esplees*, the *pernancy* or taking of the profits, must be laid first in the donor, and then in the donee: which is a proof of the attention, which the law pays to the actual possession and seisin of estates.

In a *formedon* <sup>c</sup> the general plea or issue was, in the old legal dialect, *ne dona pas*, a denial of the gift in tail. But the tenant may also put in a <sup>d</sup> special plea, as a common recovery, or an exchange.

Formedons <sup>e</sup> of all sorts must be brought within twenty years next after the title and cause of action first descended or fallen.

There is no doubt entertained, that for-

<sup>a</sup> 8 Co. 88. a.

<sup>b</sup> F. N. B. 504.

<sup>c</sup> 1 Lut. 851. b.

<sup>d</sup> Noy 1. 1 Inst. 384. b.

<sup>e</sup> St. 21 J. I. c. 16. § 1. correcting the st. 32 H. VIII. c. 2. § 5. by which fifty years were allowed.

medons

medons may be removed, after issue joined in the common pleas, by the *nisi prius* process, in order to be tried on the circuits.

I shall now make a brief mention of the other general class of real actions, which are such, where, altho the demandant is not permitted to regain possession of his lands by entry, yet his seisin or estate is not in the sense and idea of the law totally divested or turned to a mere right. This case happens, where the wrongful possessor of an estate dies seised thereof, and his heir enters by the apparently just title of descent. Such descent is said to *toll* or take away the entry of the rightful owner. He is no longer allowed to do himself expeditious justice, but must have recourse to the forms of forensic proceedings to obtain restitution of his lands.— These legal remedies are a *writ of entry*, and an *assize*; each of which respectively is branched out into a great diversity of antique forms, adapted to the occasions of different demandants. 3 Bl. Com. 176.

I. Writs of entry were of old most commonly brought, where the tenant (viz. he

that has the freehold in the land) *entered*, or came to the possession, lawfully, without fraud or *tort* (that is, wrong) as by the deed or consent of another, who either came to the land unlawfully, (as by disseisin) or who had but a particular, or defeasible, estate. They <sup>f</sup> have their name, because they specify the manner or circumstances of the tenant's entry; after which they shew for what reason the possession ought not to be detained from the demandant.

II. Of a very similar nature is that other possessory remedy of an assize: which <sup>g</sup> is a suit much favoured by the antient sages of the profession. The law is said to abhor delays, which are thrown in its way, and to reject such exceptions as might be allowed to abate other writs. An <sup>h</sup> assize may be brought of divers incorporeal hereditaments, as a rent or right of common. But as this is a possessory action, the demandant <sup>i</sup> ought to have  
or

<sup>f</sup> Booth 172.—The form of writs of entry and the proceedings thereon are preserved in common recoveries; which may also be suffered on writs of *quod ei deforceat*.

<sup>g</sup> Plowd. 90.

<sup>h</sup> Booth 263, 4.

<sup>i</sup> Booth 284.—If it be brought on the actual seisin, not of the demandant, but of his ancestor, such seisin must have been  
within

or to have had a sort of seisin in himself or by proxy. The general issue in assize is, in Norman French, *nul tort, nul disseisin*, that no wrong or disseisin hath been committed. But the tenant may also put in a special plea in bar, adapted to the nature of the action, viz. such<sup>k</sup> as shews a kind of subsisting seisin out of the demandant, and not a mere right of property, for that is not the thing in contest. The judgment is as in the other real actions, which I have mentioned, that the demandant recover seisin. It must therefore, like other real actions, be brought against the tenant of the freehold.

An<sup>l</sup> assize is to be brought returnable before the justices of assize, unless the king's bench or common pleas sit in the county,

within fifty years; if on the demandant's own seisin, the time of limitation is thirty years. (St. 32 H. VIII. c. 2. § 2, 3. 1 Bul. 162.)

<sup>k</sup> As a descent and nonclaim, or a former recovery in assize. (Booth 274: and see *ibid.* 292 &c.)

<sup>l</sup> 1 Inst. 263. a. F. N. B. 409. 4 Inst. 158. — The exclusive jurisdiction of the common pleas in real actions is referred to *magna carta*, c. 11, "*communia placita* &c." But an assize, says sir Edward Coke, is *querela*, and not *placitum*, referring, I suppose, to the general issue *nul tort*. Also if a writ in a real action be *abated* by judgment in the common pleas, and that judgment reversed in the king's bench, the latter may proceed in the suit. (2 Inst. 23. 4 Inst. 72.)

where the land lies, and then it may be tried indifferently in either of those courts. It<sup>m</sup> may also be brought before justices in eyre without commission, or justices specially commissioned.

At<sup>n</sup> common law the demandant could recover no costs or damages in any purely real actions. An assize is therefore to be considered as a mixed action. For tho<sup>o</sup> the great object of it is to recover seisin of the land, yet<sup>p</sup> damages also might be had against the disseisor himself at common law; and against the tenants also by the<sup>q</sup> statute of Gloucester, which enacts, that they shall respectively answer for their own time. And in<sup>r</sup> certain cases double or treble damages are recoverable by particular statutes.

These possessory real actions, called *a writ of entry*, and *an assize*, are fallen into still greater disuse, for the purpose of trying the title to lands, than even writs of right themselves, and those of a corresponding nature, calculated to ascertain the mere right of

<sup>m</sup> F. N. B. 409, 410.

<sup>n</sup> Booth 74.

<sup>o</sup> Plowd. 90.

<sup>p</sup> Booth 287.

<sup>q</sup> 6 E. I. c. 1.

<sup>r</sup> Booth 287.

ownership.

ownership. This must be accounted for from the little practical occasion of using possessory real actions. For still in certain supposable cases they are the only proper remedies. But from a change of times, and in the modes of conveyancing, a disseisin, or ouster of a freehold, with a consequent descent, taking away the entry of the disseisee, must be a very rare occurrence.

Before I conclude the present lecture, I shall just speak of another action, that of *partition*; which<sup>s</sup> agrees with actions purely real in this, that the plaintiff can recover no damages. I have already mentioned this suit, in treating of contemporary titles to estates. The law has provided<sup>t</sup> a general plea or issue, viz. that the parties to the suit *non in simul tenuerunt*. This<sup>u</sup> action, which at common law affected lands holden in coparcenary only, and consequently of inheritance, may now seek a partition of estates holden jointly or in common, and whether freehold or for terms of years; in which last particular it differs from real, and such mixed, ac-

<sup>s</sup> Booth 75.<sup>t</sup> Booth 246.<sup>u</sup> Booth 244. St. 8 & 9 W. III. c. 31.

tions,

tions, as must be brought against the tenant of the freehold.

In this inquiry I have attempted to throw some light on the doctrine of purely real, and such mixed, actions, as approach nearest in resemblance to the former class. The obsolescence of these judicial forms has too much discouraged, in lawyers of later ages, a proper attention to the subject. There is, I believe, no part of our municipal institutions so little understood; altho some degree of this knowledge is not only useful but necessary, and of almost constant application. This Mr. Booth intimates in his introduction to the nature and practice of real actions, and it seems to be proved by the favorable reception, that work has met with; which, from the want of an explanatory treatise of the kind, is even cited as an authoritative compilation; tho perhaps by an attentive reader it will not always be thought satisfactory in its depth and extent of useful learning, and is still less remarkable for the clearness and elegance of its method. But the laborious diligence of the author intitles him to applause.

## LECTURE XLIII,

*Of mixed actions.**D. E. Wheeler. Oxford.  
December 10 1827*

**I**T appeared in the conclusion of the last lecture, that the name of *mixed actions* is given to such, in which the plaintiff recovers not only restitution of his real estate or property, but *damages* also for the injury he has sustained, which latter are of a personal nature, and which alone are recovered in what are called *personal actions*. Of mixed actions I shall confine my observations to *waste*, *quare impedit*, and *ejectment*. There are others, scarce known even among lawyers but by name, (as *warrantia cartæ*, and *curia claudenda*) sunk into disuse and mere reliques of the various workmanship of antiquity. But of those, that I mean to notice, the first is not obsolete, the second very frequent, and the third by far the most usual of all methods of trying the title to lands.

I. An

I. An action of *waste* is the remedy for waste injuriously committed in houses, gardens, woods, and other lands. What shall legally amount to waste in all cases, so as to warrant this action, would be a prolix inquiry. I shall briefly observe, that it is <sup>a</sup> waste in houses to permit them to remain uncovered, whereby the timbers decay; which shews, that there may be waste by mere neglect and omission, as well as by positive acts. It is waste in <sup>b</sup> gardens to cut down fruit trees, and in woods or elsewhere to fell timber, or to <sup>c</sup> cut and lop it, whereby it decays. Oak, ash, and elm, are <sup>d</sup> timber throughout the realm, and are parcel of the inheritance, and cannot be taken by a tenant for life. Other trees as beeches and birches may be timber by custom in particular counties, where they are used for building. Lastly, in other lands, the most usual sort of waste, and the easiest to be committed, is <sup>e</sup> by converting one kind of land to a different species, as pasture into arable, wholly changing therein the accus-

<sup>a</sup> 1 Inst. 53. a.<sup>b</sup> 2 R. A. 817.<sup>c</sup> 1 Inst. 53. a. Hal. on F. N. B. 137.<sup>d</sup> 1 Inst. 53. a. Hal. on F. N. B. 137. Dy. 65. a. Mo. 812.  
<sup>2</sup> Wms. 606. 1 Rol. 355.<sup>e</sup> 1 Inst. 53. b. 1 Brown parl. ca. 357.

tomed

tomed course of husbandry, and endangering the evidence of the title.

The action of waste is to be brought by<sup>f</sup> him only, who has the next immediate estate of inheritance, in fee simple or fee tail: and if a<sup>g</sup> mesne remainder intervene, tho limited but for life, the suit is not maintainable during the continuance of that remainder. If however there be an estate for life, remainder for years, remainder in fee, this mesne remainder being but a chattel interest, is no impediment to bringing the action. The<sup>h</sup> purchaser or first acquirer of the next estate of inheritance in his family may have this action, as well as he, who claims such interest by descent.

The persons liable to be sued as defendants in an action of waste are the present tenants of the land, having something more than an estate at will, (or what was *formerly* so considered,) and less than an estate of inheritance. By the<sup>i</sup> common law tenants in dower of every distinct kind were subject to this action: to whom are<sup>k</sup> added, by force

<sup>f</sup> 1 Inst. 53. b.

<sup>g</sup> 1 Inst. 54. a.

<sup>h</sup> 2 R. A. 825.

<sup>i</sup> 2 Inst. 303.

<sup>k</sup> 2 Inst. 301, 2. 1 Inst. 54. a.

and

and construction of the <sup>1</sup> statute of Gloucester, tenants for life generally, or *quamdiu se bene gesserint*, or the like, special occupants, and lessees for years. There seems <sup>m</sup> to have been some doubt, whether tenant by the curtesy could be so sued at common law: but <sup>n</sup> he is expressly made liable to this action by the statute: and therefore <sup>o</sup> to avoid controversy, when waste is brought against tenant by the curtesy, the course and practice hath been to ground the action upon the statute. If tenant <sup>p</sup> in tail lease the lands for his own life, he shall have an action of waste against his lessee, if waste be done. Lastly, there is an action of waste between jointenants and tenants in common; in which he, who did the waste, had, before judgment, a <sup>q</sup> power of election to take the place wasted into his own purparty or share.

The plaintiff's count <sup>r</sup> or declaration in this action ought to specify how he is intitled to the inheritance. If the <sup>s</sup> lessor (who is a reversioner) bring waste, the writ shall say, in

<sup>1</sup> 6 E. I. c. 5.

<sup>m</sup> 2 Inst. 145, 300, 301.

<sup>n</sup> *Qi tient par la loi de Engleterre.*

<sup>o</sup> F. N. B. 128.

<sup>p</sup> F. N. B. 137.

<sup>q</sup> 1 Inst. 200. b. 3 Black. comm. 227, 8.

<sup>r</sup> 1 Cro. 64. Hob. 84.

<sup>s</sup> 2 R. A. 830.

speaking of the lands, "which the defendant holds of the plaintiff;" but this expression shall not be used, where the plaintiff has a remainder, and not a reversion, not even tho such remainder hath escheated to the lord of the fee.

The defendant may in this, as in other actions, put in a special plea or pleas in bar. But the general plea or issue is *nul wast*, that he hath committed no waste, spoil or destruction. This ' general issue admits nothing, and does not exonerate the plaintiff from any part of his proof; but he must shew his title, as much as if an objection had been raised to that in pleading.

The judgment " in this action, as it stood at common law, was to satisfy the damages assessed by the verdict, and to have a superintendant appointed to prevent the commission of future waste. This was in very early times. By the old \* statute of Gloucester the consequences are made much more penal to the defendant; for he is to forfeit the thing wasted, as well as to render treble damages;

\* Lut. 1547.

\* 2 Inst. 300.

\* 6 E. I. c. 5.

which

which former part of the sentence, being for the recovery of real property, *converts* this into a mixed action. Such forfeiture can only be awarded, where the suit is brought in the *tenet*, that is against the present tenant, who has a subsisting interest in the estate; and which was more commonly the case. If it be brought in the *tenuit*<sup>1</sup>, that is against one, whose estate is expired, he cannot forfeit that which he has not, and from the nature of the thing damages only can be recovered.—This action is extremely rare, partly from the<sup>2</sup> preventive remedy by injunction, which the court of chancery for the *four last centuries* has extended on these occasions, and partly from the use of special actions on the case, *in the nature of actions of waste*.

II. The second mixed action, which I proposed to speak of, is called a<sup>3</sup> *quare impedit*, and is the most common mode of contesting and bringing to adjudication the right of advowson or presentation to a church parochial

<sup>1</sup> 2 R. A. 830. 5 Co. 12. b.

<sup>2</sup> Mo. 554. 1 Vez. 525.

<sup>3</sup> 1 Inst. 344. a.

or <sup>b</sup> other ecclesiastical preferment. A man <sup>c</sup> shall not have a *quare impedit*, if he cannot allege a presentation by himself or his ancestor, or another person, from whom he claims the advowson, (which presentation is to be set forth in the declaration) except in very special cases. For if any person (says <sup>d</sup> Fitzherbert) at this day erect a church parochial by a licence <sup>e</sup> of the king, or a chantry, which shall be presentable to, and he be disturbed in presenting to the same, he shall have a *quare impedit*, without alleging any prior presentation, and he shall *count* on the special matter, that is, set it forth in his declaration on record.

An advowson being a thing of an incorporeal nature, a presentation is said both to make and to prove a fee. It makes a seisin,

<sup>b</sup> As a chapel endowed. See the authorities cited 3 Durnf. & East 649. It lies also by the persons having the right of *nomination* against him who has the *presentation*, and who obstructs the right. (ibid. 651.) But if a man be wrongfully displaced from an endowed curacy or chapel, of which he had the possession, a *mandamus* will lie to be *restored*. (Ibid. & Burr. 1043 &c.)

<sup>c</sup> F. N. B. 77. 3 Sal. 293.

<sup>d</sup> F. N. B. 77.

<sup>e</sup> The common law seems to allow any one to build a church on his own soil without licence of the king or the aid of any other authority. (3 Inst. 201.) But if within a parochial district, this must not be done to the prejudice of any rector or vicar.

and shews at the same time how it arose, and is the proper evidence of it. For the plaintiff ought to shew, how his seisin arose or was perfected, (viz. by such presentation) an advowson being incorporeal, and the right to it not to be executed by *livery*, that is, corporal investiture or tradition, as in the case of lands. But a presentation, by the grantee of the<sup>f</sup> next avoidance, is available for the grantor and his heirs. And<sup>g</sup> altho the want of alleging a presentation is such a defect as would vitiate the declaration, if demurred to, yet it will be cured by the verdict of a jury, finding that the plaintiff was seised of the advowson, as an advowson in gross. In like manner as one claiming in the capacity of heir must shew how he is heir; but if he omit it, and the other party do not demur<sup>h</sup>, it will be set right by a verdict, finding that he is heir; because the doubt was only as to the manner.

After setting forth the plaintiff's title at large, and specifying a presentation, (the ne-

<sup>f</sup> If there be an actual vacancy, neither the right of presentation for that turn, nor the advowson, can by law be granted over; the reason of which is to guard against the danger of simony. (Burr. 1506. 1510. 1512. Vol. II. 65.)

<sup>g</sup> Str. 1011, 2.

<sup>h</sup> 1 Lev. 190.

cessity whereof, as above explained, serves to demonstrate who are regularly intitled to prosecute this action) the declaration is then to state the *disturbance* complained of, viz. that the defendants, one <sup>1</sup> of whom is always the bishop of the diocese, unless the church is full, *unjustly hindered* the plaintiff from presenting a fit person to the vacant preferment. If the bishop do not mean to insist on any right of patronage, he puts in a <sup>k</sup> disclaiming plea; whereupon judgment is entered against him, with a stay of execution, until the plea between the other parties to the suit is determined. This <sup>1</sup> is called a *cessat executio*; the entry of which is only, it seems, matter of form, and amendable: but if in fact the writ of execution so prematurely issue, it is a fatal

<sup>1</sup> Hob. 320.

<sup>k</sup> Viz. " And the said A. lord bishop, by B. C. his attorney, comes and defends the force and injury, when &c. And says that the rectory of D. aforesaid is within his diocese of E. and that he hath not, nor doth he claim to have any thing in the said rectory [or the like] or in the nomination, right of presentation or patronage of in and to the said rectory, except the licensing admission, institution, and induction of parsons to the said rectory, and all such other things as belong to the ordinary of that place as ordinary. And this he is ready to verify. Wherefore he prays judgment if the said F. [the plaintiff] without assigning some special disturbance in the person of him the said bishop in this behalf ought to maintain his aforesaid action against him &c."

<sup>1</sup> 1 Rol. 363.

error. The bishop<sup>m</sup> must either in this manner disclaim, or admit himself a disturber. But the plaintiff is not bound to acquiesce in such disclaimer; for he may proceed adversely against him; and if he be found by verdict a disturber, he will then be answerable for the damages recovered.

It may be<sup>n</sup> collected, that the rejection of a presentee without good reason would constitute the bishop a disturber. If the bishop refuse to admit the presentee as an improper person, he must shew in a special plea, or in a return to the writ, the particulars of such unfitness; of<sup>o</sup> which the temporal courts have judged. In case indeed<sup>p</sup> the unfitness, objected to, be want of literature, it seems the bishop's province to decide on that point: but if particular immoralities be suggested, the truth of those facts is determinable by a jury.

The other<sup>q</sup> defendants, besides the bishop, may severally plead the general issue, which in this suit was in Norman French, "*ne disturba pas*," in Latin, "*non impedit*," and now in

<sup>m</sup> Hob. 320.<sup>n</sup> 1 Leon. 230.<sup>o</sup> Dy. 254. b. See Vol. I. 323.<sup>p</sup> 3 Durnf. & East 648, 9.<sup>q</sup> Vau. 58.

English,

English, "that he did not hinder the plaintiff from presenting." This plea leaves the plaintiff's title, not only uncontroverted, but, in effect, confessed: and the plaintiff may thereupon presently pray a writ to the bishop to admit his presentee, or at his choice maintain the fact of the disturbance, and proceed in the action for damages. The defendants may also plead, that the church is full, which is called *plenarty*; and it must be shewn, of whose presentment, and at what time. By the common law plenarty at any time before the writ of *quare impedit* was a bar to this action, but plenarty pending the suit was no bar. And now since the statute of Westminster the second; it must be a plenarty for fix<sup>n</sup> calendar months at the least prior to the writ of *quare impedit*; in which case the law will not suffer the incumbent to be removed; but still the suit may go on for damages. The church is full against a common person by institution, but not against the king till after induction.

<sup>r</sup> Vau. 58.

<sup>s</sup> 2 Inst. 360.

<sup>t</sup> 13 E. I. c. 5.

<sup>u</sup> Burr. 1455.—This was collected from the statute's using the expression of six months as synonymous to half a year. A month in general is understood a lunar month or 28 days. (2 Black. comm. 141. Dougl. 463.)

<sup>v</sup> Burn eccl. law t. benefice, subdiv. induction. Hob. 214.

At common law, damages were not recoverable in this action. Accordingly the judgment<sup>\*</sup> was only that the plaintiff should recover his presentation, and have a writ to the bishop to admit his presentee. Also<sup>y</sup> since the statute above-mentioned, the benefit thereof may be waived, and the plaintiff may still take his judgment at common law. The same statute<sup>z</sup> enacts, that if the patron have lost his presentation for that time, damages shall be awarded for two years value of the church; if the six months be not elapsed, so that he is not unjustly deprived of that turn, then damages shall only be awarded to the half year's value of the vacant preferment.

If the church be not full, it is very advisable, as sir William Blackstone shews<sup>a</sup>, to make the bishop, the adverse claimant of the right of patronage, and his presentee, all defendants. Such presentee may have been instituted, but not so instituted six complete months, antecedent to the commencement of the suit; in which case there is not a perfect or conclusive plenarty, and such incumbent

<sup>\*</sup> F. N. B. 89.

<sup>y</sup> 5 Co. 59. a.

<sup>z</sup> C. 5. § 3.

<sup>a</sup> Comm. b. iii. c. 16.

may be removed: but then it is necessary, that he should be named in the writ as a defendant to the action. Indeed an incumbent, instituted on the presentation of a usurper *pendente lite*, may be removed, if judgment be for the plaintiff in the *quare impedit*. But if the clerk of the rightful patron, not being such plaintiff, be instituted *pendente lite*, he shall not be removed; tho in the granting of such institution the bishop acts at some peril. And the <sup>b</sup> bishop may be expressly enjoined not to admit a presentee, by a writ of *ne admittas*: which <sup>c</sup> process at common law, like a prohibitory order of chancery to the same effect, prevents lapse.

Farther, as to making the bishop a defendant, it is advised<sup>d</sup> to leave him out, if the church be known to be full, and the suit be commenced only for recovery of damages: this however is rarely the case, and also supposes the other defendants to be responsible persons as to their circumstances.

There are many special pleas, of which a

<sup>b</sup> F. N. B. 87.

<sup>c</sup> Vin. abr. t. collation pl. 10.

<sup>d</sup> Hob. 320.

defendant in *quare impedit* may avail himself, according as his case may require, either only controverting the plaintiff's title as set forth in the declaration, or maintaining at the same time a title in himself. As to which, I shall only take notice of this distinction, that if<sup>e</sup> the defendant be also an actor, and (the church not being full) require a writ to the bishop, as well as the plaintiff, he likewise must make a good title appear upon record, subject to the rule of alleging a presentation in himself, or those from whom he claims. But when the church is full of the defendant's presentation, so that he has no need of a writ to the bishop, or where he only means to controvert the plaintiff's title without establishing a right in himself, in either of these cases he is not considered as an actor.

When the record is made up, and the cause comes on to be tried, (besides the fact of the disturbance, and any special issue, which may happen to be joined between the parties) the verdict<sup>f</sup> ought, in general, to find and ascer-

<sup>e</sup> Vau. 7, 8.

<sup>f</sup> Keilw. 57. b.—If judgment be had by default, these points are to be ascertained by a writ of inquiry of damages. (Booth 231.)

tain four points; first, whether the church is full; secondly, of whose presentation; thirdly, at what time; and lastly, the annual value of the preferment, which is the rule of the admeasurement of damages.

The writ to the bishop, which as we have seen is part of the judgment, must<sup>z</sup> in case the archbishop of Canterbury is plaintiff in a *quare impedit* be awarded to the other archbishop. If the bishop<sup>h</sup> claim nothing but as ordinary, the writ shall issue to him, tho he is a nominal party to the suit. If he be a real litigant, and a disturber, it seems more regular to award the writ to the metropolitan, tho perhaps the plaintiff has his election.

All<sup>i</sup> writs respecting advowsons must, by a private subject, be brought in the court of common pleas. But<sup>k</sup> the king, (and the crown has often been plaintiff in *quare impedit*) may sue that or other writs in what court he pleases, as in the king's bench.

<sup>z</sup> 1 Sho. 329.  
<sup>i</sup> Rol. 364. 397.

<sup>h</sup> F. N. B. 89. Dy. 253. b. 1 Brownl. 159.  
<sup>i</sup> 1 R. A. 536.

<sup>k</sup> F. N. B. 75.

A *quare impedit* is by far the most usual, and perhaps the only, action, that for a long time past hath been commenced in courts of common law to try the right of presenting to ecclesiastical preferments. It<sup>1</sup> may be brought, wherever a *darrein presentment*, a very similar process, lies; but *e converso* the rule does not hold, the difference being that the latter can only be maintained, where the plaintiff or his ancestors have presented, but a *quare impedit* may be sued by a purchaser. The bringing of a writ of right of advowson can now, as we saw in the last lecture, be scarcely in any case matter of necessity.

III. I am to speak of the common action of *ejectment*, by far the most usual mode of trying the title not to lands only, but many<sup>m</sup> other hereditaments, which ought however to be described with such sufficient certainty, that the sheriff may be able to deliver possession, if the actor in the suit succeed. Indeed<sup>n</sup> the strictness of that idea is partly worn away: for the plaintiff is to shew the sheriff

<sup>1</sup> Burn eccl. law t. *quare impedit*.

<sup>m</sup> 1 Att. pr. B. R. 401, 2. Dougl. 305.

<sup>n</sup> Burr. 629, 630.

what he claims title to, and is to take possession at his peril; if he usurp more than he has duly recovered, the court will, in a summary way, set it right. But it seems a more desirable practice, that the particular premises should be distinctly defined either by the declaration or the verdict.

An action of ejectment, in its original nature, is a suit commenced to recover a term of years, in the premises, from which the plaintiff hath been *ejected*, together with damages for such wrong done. The injury is in law supposed to be accompanied with force, in the language of the declaration "with force and arms," whence also it is called an action of trespass and ejectment. This<sup>o</sup> suit may be ranked among those of the mixed kind, not only because a term of years, the professed object to be recovered, tho part of the personal estate, is still denominated a chattel real, but also because by the help of legal fictions an ejectment hath long been the usual and familiar method of trying titles, whatever quantity of interest is in dispute.

<sup>o</sup> Comb. 250.

The practice feigns a subsisting lease or term for years, and also an ideal person, as a supposed invader of the premises, who is called the "*casual ejector*," and against whom a declaration is framed, stating the imaginary demise, and the fictitious forcible amotion of the lessee. A copy of such declaration is sent to a real person, viz. the tenant in possession, with notice given, ostensibly under the signature of<sup>p</sup> the casual ejector, for such tenant to appear and defend his title, or else that this casual ejector will suffer judgment by default, and his correspondent will in fact be turned out of possession. Hereupon the occupying tenant or his landlord may be admitted to defend the title and the possession, not only against the lessee, plaintiff on the record, who also is frequently an ideal character, but against his lessor, who is supposed to have granted a term for years, nominally in dispute, but who in fact claims a real interest in the lands. Here then it must be observed, that an action of ejectment cannot be sup-

<sup>p</sup> If such notice be signed in the name of the nominal plaintiff, instead of the casual ejector, the court will not now set aside the proceedings for irregularity. (3 Durnf. & East 351.)

ported,

ported, where this actor, this lessor of the plaintiff, and on whose demise the suit is brought, has not something more than a right of action, namely a positive right of entry. Because if he has no right of entry himself, he could not authorise his lessee to enter by virtue of his demise. Yet<sup>9</sup> it was long thought, that a legal estate in trustees, if the trust were clear and undisputed, would be no bar to recovering the lands, even in a court of law, and without resorting to an equitable jurisdiction. And the same doctrine is still maintainable, where there is a ground to presume a surrender of the trust term, for that makes an end of the legal title. On the other hand, by<sup>1</sup> a late adjudication, if there be no ground for that presumption, and a plain unsatisfied term existing in trustees, such legal title is a bar to recovering in eject-

<sup>9</sup> Dougl. 721, 2. 777. 1 Durnf. & East 758 &c. n.

<sup>1</sup> 2 Durnf. & East 696.

<sup>2</sup> 2 Durnf. & East 684—701.—Since this determination, the doctrine seems to fail, which I have advanced, (Vol. II. 153, 4 from Dougl. 23. n.) of a mortgagee recovering in ejectment against a lessee, without giving him notice to quit, where the lease is prior to the incumbrance, but the occupier is apprised, that it is only required, he should attorn: according to the late decision, tho notice to quit were given, such lease would be a bar to the action: perhaps the other points (mentioned in my same note) may now admit of some doubt.

ment.

ment.—But to recur to the practical proceedings,—if the real tenant upon such notice as aforesaid do not appear, *and enter into the common rule*, (as it is called) the plaintiff's lessor may, on affidavit of the delivery of the declaration, move the court, that unless the tenant in possession will enter into such rule, judgment may be entered against the casual ejector; the consequence of which I have before intimated. This<sup>1</sup> motion must be of the same term as the notice. But the<sup>2</sup> landlord of the tenant in possession may apply to be admitted defendant either jointly with his tenant in possession, or by himself. The *common rule*, so to be entered into by the tenant in possession, or his landlord, or both, means a submission to plead the general issue, (which in this action is “not guilty of the trespass and ejectment” complained of) and upon trial of this issue to confess lease, entry, and ouster, and to insist upon the title only.

<sup>1</sup> Sal. 257.

<sup>2</sup> St. 11 G. II. c. 19. § 13.—The court, it seems, will permit an immediate heir, or a remainderman claiming under the same title as the original landlord, to defend as landlord, under this statute; but not a devisee, who has never been in possession. (3 Durnf. & East 783.)

The confession of lease, entry, and ouster, signifies an admission, that the real actor, the lessor of the plaintiff, made a formal demise, by virtue whereof the nominal plaintiff entered and was possessed of a term in the premises demised, until the defendant (who is now substituted in the room of the casual or fictitious ejector) ousted, that is, ejected him. These are the facts alleged in the declaration, from \* the proof whereof the lessor of the plaintiff is thus exonerated, except that in the single instance of the necessity of avoiding the operation of a fine levied according to the statutes, he must still shew an actual entry. Thus the respective titles of the real litigants is made the only question in dispute; and thus this mode of trying it is ratified and authorised. But if the tenant in possession and his landlord do not comply with the terms of the common rule, (*ad vadimonium non veniant*) if they do not by their agents appear at the trial of the issue, and confess lease entry and ouster, the plaintiff, an ideal person for the most part, (and not his lessor) is formally called and nonsuited. On return however of the record into the

\* See Burr. 1897.

court, from whence it issued, the same beneficial consequence accrues to the lessor of the plaintiff as if he had prevailed before the jury, judgment is entered against the casual ejector, and the occupying tenant is turned out of possession.—The courts strongly incline to look upon these proceedings in ejectment as fictions subject to their control, as exempt from all technical strictness, and calculated for the equitable purpose of more easily adding to trial the real right and title of the respective parties. But a plaintiff may fail in ejectment, tho his mere title is undisputed, if he have not given reasonable notice to quit, (viz. six months in respect to lands to be relinquished) which is necessary in all cases, from a requisite regard both to agriculture and to the conveniencies of habitation.

Having hitherto spoken of real and mixed actions, I shall now very shortly take notice of another distinction, viz. that which prevails between *local* and *transitory* actions; the former being such as must be sued in a particular county, in which the declaration must allege the material facts to have happened, and to which the jurors must belong,  
who

who are to try the issue; the latter being such as may be laid and tried in any county at the plaintiff's election. All real and mixed actions, which relate (as they generally do) to the seisin or possession of land, are of the local kind, and must be tried in the county, where the land lies. So also <sup>r</sup> a *quare impedit* must be prosecuted in the county, where the church is, and if it be for a prebend, in that, where the cathedral stands. But personal actions are, in general, transitory, and may be brought and tried in any county. Indeed appeals of crimes by the common law, and actions on penal statutes by <sup>z</sup> act of parliament, must be brought in the proper county. And in other personal suits, tho the declaration has laid the facts, according to the arbitrary discretion of the plaintiff, in one county, the cause may be shifted to that, where it arose, by *changing the venue*, as it is expressed, of which practice I shall make some future mention. In the mean while I shall attempt to describe the several kinds of personal actions; which will take up a greater compass, than I allotted for the discussion of those of the real or mixed kind. These per-

<sup>r</sup> 7 Co. 3. a.<sup>z</sup> St. 31 El. c. 5. § 2.

sonal actions I shall distribute into three classes; first, such as proceed *ex contractu*; secondly, such as arise *ex delicto*; and lastly, such to which is affixed the imputation of force and violence. But I shall previously take a general view of the pleadings in personal actions, which will be the subject of the next lecture.

## LECTURE XLIV.

*Of the pleadings in personal actions.*

A BRIEF didactic account of the *rationale of special pleading*, if it be attended with any success at all, if it open any insight into that science, will be an easy attainment of some degree of knowledge, of a very useful kind.

The alternate allegations of the parties to a suit, comprehending the charge made and supported by the plaintiff, and the defendant's answers to it, all which are parts of the record, are called the *pleadings*. The first of these is the plaintiff's declaration, which is followed by the defendant's plea, and then may succeed a replication, rejoinder, surrejoinder, rebutter and surrebutter, which alternately come from the respective parties, but the record is seldom carried to this extent. For the pleadings may at any stage be brought to a conclusion by an *issue in fact*, that is, something positively affirmed on the one hand and denied on the other, which goes to a jury to

be ascertained, or by an *issue in law*, called a *demurrer*, which rests solely on the matter of law, and attends the judgment of the court.

The nice accuracy required in special pleading is mentioned by some as a reproach to the law, while others speak of this science as a very useful and honorable attainment. The end proposed by such technical exactness is to bring the matters in litigation to a point, material in itself, simple, and <sup>a</sup> unambiguous. If the rules, relating to this subject, have been at any period too scrupulously rigid, they have been very much and very equitably relaxed, partly by positive acts of parliament, and partly by the liberality of the superior courts. Sir Edward Coke observes<sup>b</sup>, that, in the reign of Edward the third, pleadings grew to perfection. Afterwards, in the reign of Henry the sixth, the judges, he tells us, gave a quicker ear to exceptions, than their predecessors did, or, we may add, in general, their successors have done.

<sup>a</sup> I have heard it remarked by a gentleman alike distinguished by his philosophical and professional attainments, that he thought special pleading was the best logic in the world, next to mathematics.

<sup>b</sup> 1 Inst. 304. b.

The language of these pleadings was antiently Norman French, the same dialect, in which the year books and most of the old legal writers and reporters are printed. By a<sup>c</sup> statute of Edward the third, pleadings are to be pleaded, shewn, defended, answered, debated and judged in the English tongue, but to be entered and inrolled in Latin. For antiently all pleadings were publicly rehearsed in court, and minuted down by the proper officers; tho the course has long been to omit this recital, and only to deliver them on paper, (which must be duly stamped) to the minister of the court, who enters them on the parchment roll. Latin continued to be the language of the records for about three hundred and seventy years, when the legislature again interposed, and ordained<sup>d</sup>, that all legal proceedings should be in English, and should be entered in a common legible hand without<sup>e</sup> abbreviations.

<sup>c</sup> 36 E. III. ft. 1. c. 15.

<sup>d</sup> St. 4 G. II. c. 26.

<sup>e</sup> The impropriety of such abbreviations may appear from this, that even serjeant Hawkins (2 P. C. 252.) advises, in many cases, "to conclude *contra formam statuti*", which shall stand (says he) either for *statuti* or *statutorum*, or be rejected, in such manner as will best maintain the indictment." Surely an end is very justly put to such purposed ambiguities.

The first part of the pleadings is, as I have said, the *declaration*; which is an exposition of the writ, stating the plaintiff's case or ground of action with the particulars of time and place, and specifying the sum at which he affects to compute the damages he has sustained. This sum is generally sufficiently high; because altho the plaintiff may recover by the verdict of a jury so much as he has declared for, or any lesser satisfaction, yet as he is supposed in law to have the best knowledge of his own damages, he can never be intitled to more than he has specified. And if a jury should happen to give greater damages than are mentioned in the declaration, and judgment be entered accordingly, such judgment is erroneous. It is therefore in such case expedient for the plaintiff to give a release for the surplus, and take judgment for such sum as he has laid his damages at in the declaration.

There are certain emphatic words used in different declarations, expressive of the kind of action, as in *assumpsit*, that the defendant “*undertook and faithfully promised,*” and so in

<sup>f</sup> Yelv. 45.    <sup>z</sup> Sho. 57.

other instances. The forms of declarations are farther diversified by the distinct occasions, on which the same mode of action is allowed to be brought. The same declaration may also consist of separate *counts*, as they are called, in which the plaintiff repeats his case anew with some variation, or usually in a more general and uncircumstantial manner, in order to adapt it more easily to the proof, which he shall be able to adduce at the trial, or perhaps subjoins some other cause of action of the same species with the former, and seeks a satisfaction for both. But <sup>s</sup> causes of action foreign in their nature, as those of *trover* and *assumpsit*, (one of which is supposed to be founded on a *tort*, and the other on a contract) cannot be joined in the same declaration. Every separate count is substantively a declaration, so that the plaintiff may have judgment on any one of them, to which his evidence applies, and which is maintainable in respect to form. But <sup>h</sup> if any of the counts be materially defective, and intire damages be given, that is without discrimination of the particular counts, and the

<sup>s</sup> 3 Lev. 99. 1 Durnf. & East 276, 7.

<sup>h</sup> 1 Lev. 298. 6 Mod. 128.

plaintiff's agents omit at the trial to select some unexceptionable count, on which they profess their intention to rely, the judgment must be arrested; for the counts are so far distinct, that what is faulty in one cannot be supplied from another, and the jury in their verdict might perhaps have had regard to such an informal state of the plaintiff's case, (viz. in the defective count) as the law will not allow to warrant an action. If however<sup>1</sup> evidence were only produced on the good counts, and a general verdict given, it may be corrected from the notes of the judge.

The next consideration is the defendant's *plea*; which may be either dilatory, or in bar of the action. Of the former kind are objections to the jurisdiction of the court, or to the plaintiff's ability to sue by reason of outlawry, or the like, misnomer of the defendant, and other matters, which may be read of under the title "*abatement*" in many law books, and the doctrine of which is neither of the most important kind, nor easy to be abridged. The<sup>j</sup> courts exact the greatest

<sup>1</sup> Dougl. 376.

<sup>j</sup> 3 Durnf. & East 185, 6.

precision

precision and adherence to form in these dilatory pleas.

Pleas in bar are either the general issue, or some special defence; and both must be formally adapted to the peculiar action, in which they are used. By the antient law a defendant could avail himself of only one peremptory plea: and the contrary attempt is rather ludicrously\* compared by our early writers to the unfairness of a champion in the trial by battel, who should use more batons than one. But by the<sup>1</sup> statute for the amendment of the law, any number of defences is allowed; the wisdom of which regulation is confirmed by experience. For example, if an action of trespass be brought for entering the plaintiff's close, the defendant may have several distinct grounds to justify what he has done; which being put upon the record give him a reasonable opportunity of establishing at the trial, what can most satisfactorily be proved.

The general requisites of these special pleas

\* 1 Inst. 304. 2.

<sup>1</sup> 4 A. c. 16.

are,

are, that they answer the whole declaration—that they are certain—not argumentative—not amounting to the general issue—and not containing duplicity.

1. As to the first requisite, therefore<sup>m</sup>, if a defendant be charged with taking three hundred sheep, and he justify as to part only of that number, without answering at all concerning the residue, this would amount to what is called *discontinuance*, and judgment would be entered generally against him. But as declarations for obvious reasons enhance and overrate the charge, the common course is for the defendant to plead a justification as to what he has actually committed, and *not guilty*, to answer the residue; which mode of defence may be thrown into separate pleas, or otherwise joined in one to save expence.—I shall here observe, in regard to the plea's answering the declaration, that in transitory actions the defendant cannot vary from the place alleged by the plaintiff. As<sup>n</sup>

<sup>m</sup> 1 Cro. 434. 2 Mod. 259.

<sup>n</sup> 1 Inst. 282. b. See 1 Will. 219.

if an assault and battery be laid at Burford in Oxfordshire, the defendant cannot justify this trespass in another county, but must pursue the plaintiff's supposition, that it happened, where he has mentioned, unless for some particular reason disclosed in the plea the locality is really material to the defence. For otherwise the plaintiff would lose the liberty, which the law allows him, of trying transitory actions in any county. Farther, if the defendant justify a charge different from that contained in the declaration, the plaintiff may put in, what is called a *novel or new assignment*. As if in trespass *quare clausum fregit*, (that is for breaking and entering the plaintiff's close) the identity of the lands be doubtful, the plaintiff may newly assign or repeat the charge, describing the place intended by its boundaries and dimensions. New assignments must also be used, wherever the matter justified is different from that, which appears to be the cause of action.

2. Pleas, as well as declarations, must be

\* See 2 Will. 4. 1 Durnf. & East 479. 2 Durnf. & East 172, &c. 3 Durnf. & East 297, 8.

*certain,*

*certain*, not vague or too general, and must contain every essential allegation, with the<sup>p</sup> place, or *venue*, of such points, on which issue may be joined, in order to their being tried. The degree of such certainty may be partly estimated by the end of it; which in declarations is, that the defendant may be able to answer them, and the court to give judgment, and in pleas, that they amount to a full and complete bar. But<sup>q</sup> certainty to a *common intent* is sufficient; as if it be said, that the master and fellows of a college are seised in fee, this shall be understood to be in right of their college; and if<sup>r</sup> one claim as heir, it shall suffice, without saying that the ancestor is dead, or had no son, for necessary circumstances shall be intended; and it would be absurd to search for possible facts, which do not appear, to defeat the more obvious and reasonable construction. Another rule is, that<sup>s</sup> matter of *inducement* or *conveyance* to the principal matter need not be so certainly or fully expressed, as the very substance of the plea, or what is, for example, a constituent

<sup>p</sup> See 2 Durnf. & East 30.

<sup>q</sup> Plow. 26. 102. Dougl. 158, 9.

<sup>r</sup> Dal. 67. See 1 Lev. 190.

<sup>s</sup> 1 Inst. 303. a. See 3 Durnf. & East 645.

part of the title. Thus ' in an action of assault and battery, if the defendant justify for that he was possessed of a certain house for years, of which the plaintiff would have ousted him, but he, in defence of his possession, *molliter manus imposuit*, gently laid his hands on the assailant, this is sufficient, without shewing under whom or for how many years he was lessee. For the force was lawfully repelled with force. But in actions, where the title may come in question, the<sup>u</sup> commencement of *particular* estates (that is all such as are less than fee simple) must be shewn, that the adverse party may contest the lawful creation of such estates. Thus a justification by virtue of some prescription may be pleaded two ways; as first in a<sup>x</sup> *que estate*, or the<sup>y</sup> *immemorial* right of those *whose estate* the defendant enjoys; or such prescription may be alleged in the defendant *and his ancestors*, that is according to the course of descents at

<sup>t</sup> 3 Cro. 138, 9.<sup>u</sup> 1 Inst. 303. b. 3 Will. 72.

<sup>x</sup> It is said, a man cannot prescribe for a thing, that lies in grant (and does not pass without deed or fine) otherwise than in himself and his ancestors, and not by *que estate*, for then he ought to shew the deed. (1 Inst. 121. a.; *tamen quære.*)

<sup>y</sup> After verdict, the omission of the word "immemorial," or words tantamount, has been holden immaterial. (3 Durnf. & East 147, 8.)

common

common law in fee simple. If the defendant be not owner of the inheritance in fee, but have only an inferior interest, and the prescriptive claims extend (as they generally do) to tenants, farmers, and occupiers, still the prescription is laid as appertaining to the fee simple, and then the commencement of the particular estates, clothed derivatively with the privilege in question, is regularly traced. It must however be observed, that the necessity of displaying the commencement of particular estates is confined to those who claim under such right or title. For<sup>2</sup> if a plaintiff in an action of debt allege that A. was possessed of a term for years, and granted him a rent out of it, which term came by mesne assignments to the defendant, this is sufficient; for he cannot be expected to set forth a title or conveyances to which he is apparently a stranger. Or<sup>3</sup> if a man lay any other charge upon lands in the occupation of another, as the duty of repairing fences, it seems generally sufficient to charge him as occupier.

As to what matters are requisite to be specially stated and averred, it seems difficult to

<sup>2</sup> 1 Lev. 190.

<sup>3</sup> 3 Durnf. & East 768.

give many other general rules. This however may be remarked, that the points, on<sup>b</sup> which the merits of the case antecedently depend, are necessary to be alleged; but matters subsequent, which go in defeasance or avoidance of the plea, need not to be noticed; as, if true, they may more properly and pertinently come from the adverse side; and<sup>c</sup> the possible intendment of unknown circumstances shall not be admitted as an objection of any force. Thus it is laid down<sup>d</sup>, that if an act of parliament makes writing necessary (which was not so before) to a common law matter, you need not plead on record the thing to be in writing, tho you must give it so in evidence. But where a thing is originally introduced by statute, and required to be in writing, you must plead it with all the circumstances prescribed by the act, as in the case of devises. On the other hand, a promise to answer for the debt of another, which is required to be in writing by the<sup>e</sup> statute of frauds, (that not being before necessary) you need not plead as such, tho you must prove it so in evidence. Such

<sup>b</sup> 7 Co. 10. a.<sup>c</sup> Plow. 26.<sup>d</sup> 2 Sal. 519.<sup>e</sup> 29 Ch. II. c. 3. § 4.

leases also as are made void by that <sup>f</sup> statute, unless in writing, may <sup>g</sup>, I apprehend, be pleaded as if they were by parol, and without a <sup>h</sup> *profert*, or professed production of the deed or writing <sup>i</sup>, tho it must be given in evidence; because the objection should come from the other side. But in case of incorporeal hereditaments, which *at common law* will not pass without deeds, there the instrument must be shewn in pleading. Thus we see a plea may be objectionable by reason of the omission of material allegations: it can rarely however be excepted to as being too full, the rule being <sup>k</sup>, that *surplusage* shall not vitiate, *unless* it be repugnant to the other matters. It is therefore <sup>l</sup> a common attempt to establish the validity of pleadings, by rejecting and laying out

<sup>f</sup> § 1, 2, 3.

<sup>g</sup> But see 2 Willf. 49. 27.

<sup>h</sup> The general rule was understood to be, that a deed could not be pleaded, without *profert*. But it has of late been very equitably adjudged, that an instrument may be pleaded, as lost by time or accident, or as destroyed by fire or the like, without *profert*: for *lex non cogit ad impossibilia*, and no human prudence can render deeds of perpetual existence. (3 Durnf. & East 151 &c.)

<sup>i</sup> It need not be a deed. 2 Willf. 27.

<sup>k</sup> 1 Inst. 303. b.

<sup>l</sup> See B. R. Hardw. 341. 3 Willf. 414. 1 Durnf. & East 322. 3 Durnf. & East 377.

of consideration certain passages as being surplusage.

3. It is requisite, that <sup>m</sup> pleadings should be *direct and positive, not argumentative* or only implying an answer to the declaration; for this would occasion confusion and circuit. Thus <sup>n</sup> in the derivation of a title, if it be stated, that "by a certain indenture *it is witnessed*, that A. assigned a term to B," which fact is the very substance of the plea, this is vitious pleading. But <sup>o</sup> in an action of covenant, the deed may be set forth in such form of recital, because here it is inducement only, and is followed by a direct charge of the breach of covenant. And <sup>p</sup> even such argumentative plea shall be aided by verdict, or on a general demurrer.

4. It is necessary, that the <sup>q</sup> plea do not amount to the *general issue*; for then the latter should have been relied <sup>o</sup> on to avoid prolixity; which is also more safe, easy and convenient

<sup>m</sup> 1 Inst. 303. a. Yel. 223, 4. Sav. 86. See 2 Will. 203, 4.

<sup>a</sup> 2 Saund. 319.

<sup>o</sup> 3 Cro. 188, 9. 2 Cro. 537.

<sup>p</sup> Al. 48. <sup>q</sup> But see Dougl. 649. n. 2 Durnf. & East 443.

to the defendant, leaving the whole *onus probandi* to the plaintiff. As the characteristic criterion of pleas amounting to the general issue, they may perhaps be described to be such as disaffirm the very matter, and the whole of it, which the plaintiff, on the general issue, is bound to prove. The most familiar instance is of such justifications in actions of trespass on the plaintiff's close, as suppose him out of possession; and which would be bad by reason of amounting to the general issue, without *giving color*, as it is called, that is, without surmising in the plea, that the plaintiff entered and was possessed under some colorable and false title, on whose possession the defendant re-entered, which<sup>r</sup> is farther alleged to be the same supposed trespass complained of in the declaration.

5. The last requisite, which I shall mention, of a plea in bar, is that it be not *double*. Duplicity is<sup>s</sup> where several matters are alleged

<sup>r</sup> "*Quæ est eadem transgressio*," the concluding form in all justifications.

<sup>s</sup> It is said, Poph. 186, that a plea may be double, where some of the matters are unimportant, if they have not a mutual dependence on each other: but in such case it rather seems, they should be rejected as surplusage. (4 Bac. abr. 119.)

in the same plea, each of which separately would be a sufficient bar, or at least purports so to be. Duplicity<sup>1</sup> is not such a fault as can be taken advantage of on a *general* demurrer.

To the several pleas in bar there must be distinct *replications*, and to them separate *rebutters*, and so on, till the issues are joined.

Most of the rules, laid down with respect to the plea; apply also to the replication. It is farther necessary, that the plaintiff in his replication do not *depart* from what he has surmised in his declaration, as the defendant is bound not to *depart* in his rejoinder from what he has stated in his plea, and the like caution must be observed by each party in their subsequent pleadings respectively. *Departure* is a technical expression", and signifies the allegation of new matter not pursuant to that contained in the former pleading of the same party, and not maintaining or fortifying the same. If therefore the<sup>2</sup> defendant intitle himself by descent, and the plaintiff reply a feoffment from the defendant

<sup>1</sup> 1 Willf. 219.<sup>2</sup> 1 Inst. 304. a. 2 Willf. 96 &c.<sup>3</sup> Plow. 8.

himself, and the defendant rejoin, that it was a feoffment upon condition, for breach whereof he entered, this is a departure, for it is a new title, and the subsequent matter does not fortify the bar.—The condition of a bond was to stand to the arbitrament of J. S. between the defendant and the tenants of J. D. the plea was, that no award was made, the replication shewed an award between the defendant and certain persons, naming them, tenants of J. D. the rejoinder denied, that they were tenants of that landlord, this is not a departure, but good. This case is cited from the year books in a treatise of some credit, the author of which suggests as a<sup>y</sup> probable reason for the determination, that the plaintiff had alleged matter, which gave occasion to this rejoinder. This appears ill founded; for the same reason will extend to all or most of the cases that have notwithstanding been adjudged departures. The true reason, I apprehend, is a simple and obvious one, viz. that if the persons named were not the tenants of J. D. then there was no award made, and so<sup>z</sup> the rejoinder fortifies the bar.

Sometimes

<sup>y</sup> Doctr. plac. t. departure.

<sup>z</sup> Thus if the defendant plead in bar a feoffment from J. S. and the plaintiff reply that he was disseised by J. S. who afterwards

Sometimes a general and succinct form of replying is allowable ; as I propose to shew in treating of actions of trespass.

Replications, as well as other parts of pleading, are frequently introduced with a *protestando*, or protestation made to the intent that the party using it may not be concluded by the supposed admission of any thing alleged on the other side. Neither<sup>a</sup> is it any objection to this form of pleading, that there is gross contradiction or repugnance between the *protestando* and the substance of the plea.

It is now time to renew the mention of *joining issue*, which is done by taking a *traverse*, that is a denial of some allegation in the foregoing pleading, and it is usually formed by the words "without<sup>b</sup> this," that such or such a representation is true. As if a custom

wards infeoffed the defendant, and so the plaintiff lawfully re-entered, here the defendant may rejoin, that the plaintiff confirmed the estate of J. S. after the disseisin, and after such confirmation, J. S. having a rightful as well as actual seisin, infeoffed the defendant, and it is no departure, for it fortifies the former bar. (Plow. 105.)

<sup>a</sup> 5 Mod. 136.

<sup>b</sup> A translation of the barbarous Latin "*abq; hoc*" used before the abovementioned statute introduced the vernacular tongue,

or prescription be relied on as a defence, the plaintiff may reply, that the defendant committed the trespass of his own wrong, "*without this that the plaintiff, and all those whose estate he hath,*" and so forth, following the expressions in the bar. The defendant in his rejoinder repeats his former assertion, and thus at length issue is joined. A traverse<sup>c</sup> must be taken of some allegation contained in the former pleading on the adverse side; and a plea cannot conclude with a traverse of what has not been before asserted, tho it may affect the merits of the case. A traverse<sup>d</sup> must also be of a point, (if not the principal and most material in the former pleading) at least so important and essential, as, if found in favor of him who takes it, destroys the right of action or the defence of the adverse party. Another rule is, that it should not contain a *negative pregnant*, which is a technical expression, signifying not a simple, positive and direct, but a qualified, assertion or negation: as <sup>e</sup> traversing, that a man granted by deed, where any grant, tho by parol, would be effectual; or <sup>f</sup> traversing, "*that one did not demise on the*

<sup>c</sup> Lut. 938. 1560.

• 1 Inst. 126. a.

<sup>d</sup> Comb. 321.

<sup>f</sup> 2 Lev. 11, 12.

*day and at the place mentioned on the other side,"* for it should be, "*that he did not demise in manner and form,*" and so forth, the time and place being not traversable, but to be left open for proof not so circumscribed. Farther, a <sup>h</sup> traverse cannot be taken of a mere matter of law: but matters of law mixed with fact, as that a man obtained a church by simony, or that such a person was seised in fee or in tail, are traversable. Lastly, where any plea concludes with a proper and material traverse, the law, to avoid endless prolixity, will not, in general, allow a new traverse to be taken by the adverse party, but he must be contented to join issue on the former. It is mentioned <sup>i</sup> as matter of opinion, that a traverse upon a traverse shall never be taken, but where the former is not material to the action brought. It should rather be expressed, affirmatively, that a traverse upon a traverse may be taken, wherever the former is not material. For instances <sup>k</sup> may be found, where the first traverse is material, and yet the second allowed. Perhaps therefore the <sup>l</sup> rule ought

<sup>h</sup> 3 Will. 234.

<sup>i</sup> Vau. 621

<sup>k</sup> 5 Com. dig. 109.

<sup>l</sup> Thus in Hob. 105, the survivorship of Richard Cromwell was material of the plaintiff's own shewing; and therefore he

ought to be confined to those cases, where the former traverse appears to be material, by the shewing of that party, who proposes a new traverse.

It is here proper to mention, a very equitable rule of pleading, that <sup>m</sup> where new matter is replied, or where the plea contains a statement of several facts, and one in particular is selected and replied by way of a partial disaffirmance of the case so made, the replication ought to conclude neither with a <sup>n</sup> traverse, nor  
by

could not take a second traverse. So in the principal case reported there, and in Mo. 869, 870, the plaintiff having laid the seisin of Fitzherbert in fee, and that therefore being a material fact of his own shewing, he gave the defendant just occasion to traverse it, and could not himself take a second traverse. Such seems at least the better opinion, for the court was divided. But in the case in 1 Inst. 282. b, the place does not otherwise appear to be material, except from the defendant's plea.

<sup>m</sup> 2 Willf. 66, 67. Cowp. 575. Dougl. 60. 2 Durnf. & East 442, 3.

<sup>n</sup> See Dougl. 428 &c. Str. 871. — Even the special traverse in those cases appears *unnecessary*; and the replications, if it had been omitted, might have concluded to the country, and issue been immediately joined: or perhaps the traverse itself might have concluded to the country. (1 Sal. 4. Bur. 317. Dougl. 95, 96. n.) Which shews that custom in some instances hath sanctioned a fruitless prolixity of pleading, to no end; for the plea having set forth the special matter, the traverse was material of the defendant's own shewing, and no new traverse could be allowed. Yet such is the more usual form. (2 Willf. 105.) — If the replication put the whole substance of the plea in issue, the plaintiff may conclude to the country. But  
some

by ° tendering an issue to be immediately joined, but with an *averment*, viz. “*and this the said A. is ready to verify;*” that is, it must be so drawn as <sup>p</sup> to give the defendant an opportunity of specially answering such new or special matter.

There remains to be mentioned the other kind of *issues*, which involve questions of mere law, and are called *demurrers*. A <sup>a</sup> demurrer is understood to admit the truth of the facts advanced by the other side, if there shall eventually appear to be no defect in the manner of pleading them, but never to admit any matter of law. Either defective pleading or the substantial merits of the case in point of law may occasion a party to demur, and either to the declaration, or any of the subsequent

some of the above authorities, and what came from the court in a late case (2 Durnf. & East 443.) seem to shew that a party has not uncommonly his choice of concluding with an averment or to the country.

• This is called concluding to the country. If it be a rejoinder or other pleading of the defendant, the form is, “and of this the said B. puts himself upon the country;” if it be a surrejoinder, or other pleading of the plaintiff, the form is, “and this the said A. prays may be inquired of by the country;” then follows, “and the said B. or A. doth the like;” which is called adding the *similiter*. In this manner issue is constantly joined.

<sup>p</sup> 2 Durnf. & East 576.

<sup>a</sup> Lord Raym. 18.

pleadings,

pleadings, (for example) insisting, that "the matters contained in the plea, are not sufficient in law to bar the plaintiff," or that, "the matters contained in the replication are not sufficient in law to maintain the action," as the case may be. After this, there is a joinder in demurrer, affirming that the matters so contained are sufficient for their intended purpose; and then the cause rests for the judgment of that court, to which the record belongs, without the intervention of a jury, who are only to ascertain issues of fact, or fact mixed with law. And if one party will demur, the other is bound to join in demurrer. But there cannot be a demurrer and plea at the same time to the same declaration.

Demurrers are *general* or *special*, the latter specifying the causes of demurrer, of which the former is silent. This distinction obtained at common law; but is become more important since the statute, by which it is provided, that in giving judgment no regard shall be had to any imperfection, defect, or

<sup>r</sup> 1 Inst. 72. a.    1 Freem. 253.    <sup>s</sup> 10 Mod. 280, 1.

<sup>t</sup> Plow. 66.

<sup>u</sup> 27 El. c. 5.

want of form in pleadings, except those only, which the party demurring shall specially exprefs. Hence matters of fubftance only (important and not trivial informalities) could be taken advantage of on a general demurrer. The ftatute<sup>x</sup> for the amendment of the law explicitly ordains, that no regard fhall be had on general demurrers even to what might be deemed fubftantial defects, provided enough appears to give judgment. This however<sup>y</sup> feems to have been the rule antecedently adopted by the courts. Indeed the<sup>z</sup> omiffion of things, without the due knowledge whereof, the court cannot give judgment, cannot be fupplied. And therefore *fhince* the ftatute for the amendment of the law, matters of real fubftance, neceffary to be particularly afcertained, are ftill available even on a general demurrer. But defects of form, tho they are fpecially fhewn for caufes of demurrer, and tho they vitiate the proceeding, are now amended, in common practice, on, and poffibly without, payment of cofts, by leave of court.

It is an invariable maxim, that<sup>a</sup> whoever

<sup>x</sup> 4 A. c. 16. § 1.

<sup>y</sup> Hob. 133. 233. See 3 Mod. 235.

<sup>z</sup> Sav. 88.

<sup>a</sup> 2 Wils. 100. 3 Wils. 234. 3 Durnf. & East 186 &c.

makes

makes the first fault in pleading, shall have judgment against him. Thus if a demurrer be put in to the plaintiff's replication, it avails not, what faults there may be in that very replication demurred to, if the plea in bar be also defective, for then judgment must go against the defendant.

Generally the judgment in demurrer is peremptory: for he, who has admitted the truth of facts, and has had a determination against him on the matter of law, must be concluded. There <sup>b</sup> never is a judgment to *'answer over*, but where there is a dilatory plea pleaded, or to the jurisdiction of the court, or to abate the writ. But <sup>d</sup> if there be a demurrer to a plea to the jurisdiction of the court, or to any plea in abatement, and it be ruled in favor of the party demurring, the judgment then indeed is only that the defendant answer over.

All pleadings subsequent to the declaration must be signed by counsel, and in the <sup>e</sup> com-

<sup>b</sup> 12 Mod. 676.

<sup>c</sup> *Respandeat ouster* in the barbarous Latin of former ages.

<sup>d</sup> Jenk. 306. Cowp. 845. 3 Durnf. & East 186.

<sup>e</sup> 2 Will. 74, 75.

mon pleas by a serjeant at law, before they can be received in the proper office.

I have avoided any disquisition into the nature of <sup>f</sup> *repleaders* and <sup>g</sup> *estoppels*, because they are grown much into disuse. And as to what I have set down, it must be remembered, that our law books are full of cases solely respecting this science of special pleading, which partly from their number, partly from their repugnancy to modern and progressive reformatations, and partly from the technical and diffusive nature of the subject, produce intricacy and confusion. A ready expertness in the forms of pleading can hardly be attained but by being early trained in these habits of the profession. I have however attempted to digest and to convey as adequate an idea of this useful and difficult branch of knowledge, as I could comprise intelligibly in so small a compass.

<sup>f</sup> See Cowp. 510.

<sup>g</sup> See 1 Durnf. & East 86 &c. 701 &c.

## LECTURE XLV.

*Of personal actions founded on contract.*

PERSONAL actions, as we have before described them, are those in which mere personal property is demanded. They may most properly be divided into such as arise *ex contractu*—or *ex delicto*,—or such where forcible violence is used, or imputed by the law. The first sort have their origin from some contract expressed or implied; the breach of which is indeed injurious; but the second and last kinds are referred solely to *tort* or wrong, and do not proceed on the idea of any actual or supposed convention or engagement.

A principal use of the distinction is, that it helps to mark what actions may be brought by or against executors or administrators. Personal actions are generally said, by a very improper want of discrimination, to die with the person. For those founded on contract  
\* survive,

survive, and may be instituted by or against the representatives of either party, except where the testator or intestate might have *waged his law*, that is, might have cleared himself, by his denial, upon oath, of the justice of the demand; attended with the other requisites, appropriated to that species of defence. And even this small exception is of little avail, as the creditor in such cases may sue the personal representative of his deceased debtor in a different mode, that is, instead of an action of *debt*, bring an action of *assumpsit*.

In <sup>b</sup> regard to actions arising from torts, the contrary rule prevailed. But by an antient <sup>c</sup> statute executors are allowed to prosecute for taking the goods of their testator; and now in all cases where there has been an invasion of property the representative of the deceased may sue for redress. For <sup>d</sup> upon the equity of that statute wrongs done to his estate remain actionable. Injuries however to his person or character must be vindicated in his life time. As to <sup>e</sup> cases where the *wrongdoer* dies before relief obtained, the rule seems universal, that his representative is not liable to be sued for any wrong or trespass, except

<sup>a</sup> 9 Co. 87. b.<sup>b</sup> Pal. 330.<sup>c</sup> 4 E. III. c. 7.<sup>d</sup> 4 Mod. 404.<sup>e</sup> Went. 126.

where

where he continues the injury. Such I apprehend to be the diversity, that obtains in this view of the foundations of personal actions, (contract, and misfeasance with or without force) as to the power of suing in personal representatives, and their capacity of being sued.

There are some important distinctions between executors and administrators. An<sup>f</sup> executor of an executor represents the first testator in all things, except where a special trust is reposed. But<sup>g</sup> an executor of an administrator does not represent the original intestate without a fresh grant of administration for the effects unadministered. If an<sup>h</sup> executor commence an action before probate of the will, and afterwards prove it, it shall avail by relation between the parties; tho in respect to strangers, an arrest before probate is said to be of no avail, for example, not such an arrest as to occasion an act of bankruptcy. But<sup>i</sup> an administrator cannot commence

<sup>f</sup> Went. 255, 6. Sal. 311.

<sup>g</sup> Went. 366.

<sup>h</sup> 3 Lev. 58. 1 Vent. 370. T. Raym. 479. Skin. 22. 1 R. A. 917.—An executor may release &c. before probate. (1 Durnf. & East 480.)

<sup>i</sup> Sal. 303.—Yet if an administrator have once substantiated his claim, as by the judgment of a foreign court, he need not again

commence an action before administration granted.

The nature of contract, as a title to personal goods, has <sup>k</sup> formerly in a cursory manner been discussed. I proceed therefore to this class of actions founded thereon; under which I shall consider first *annuity*; secondly, *account*; thirdly, *covenant*; fourthly, *debt*; fifthly, *detinue*; and sixthly, *assumpsit*; the five first only will occupy our present attention; the last being of very frequent use, and applicable to a great variety of occasions, will be the subject of the two following lectures.

I. An <sup>l</sup> *annuity* may be granted to a man and his heirs, and he shall have in it a fee simple personal, that is a personal estate descendible like lands *in infinitum*. If it be charged <sup>m</sup> on lands, it is not then a fee simple personal; but a rent-charge and a real estate.

again plead his letters of administration, with a *proferat*, in an action founded on that judgment, tho the omission be shewn for cause of special demurrer. (Dougl. 4, 5. n.)

<sup>k</sup> Vol. II. 410 &c.

<sup>l</sup> 1 Inst. 2. a. Vol. II. 71 &c.

<sup>m</sup> W. Jon. 214, 5.

The heirs of the grantor are not under any necessity of payment, unless<sup>n</sup> they are called upon in the terms of the gift, the grantor professing to grant for himself and his heirs; nor then, unless<sup>o</sup> they enjoy lands by descent in fee simple from the ancestor, who created the annuity, sufficient in value to satisfy the demand. But annuities have always been more commonly granted for life or years. If any such yearly payment be in arrear, the remedy formerly usual, and still legal, is a writ of annuity: which admits of various defences. For the defendant may deny the grant, or plead<sup>p</sup> a release; or if (for example) the<sup>q</sup> annuity was bestowed *pro consilio impendendo* in the juridical profession, it is a sufficient bar, that the plaintiff refused his advice, and so in like cases. The<sup>r</sup> judgment in this action is for the annuity, the arrears, damages, and costs; and in case of an heir defendant, that the plaintiff have execution of the tene-

<sup>n</sup> 1 R. A. 226.

<sup>o</sup> See 3 Cro. 436, 7.

<sup>p</sup> A release of actions real is said, 1 Inst. 285. a, to be a bar; but adj. cont. W. Jon. 214, 5; and that this is a mere personal action.

<sup>q</sup> 1 Com. dig. 384.

<sup>r</sup> See 3 Cro. 436, 7: qu. the case Co. ent. 50. a; where judgment is said to be given, that the plaintiff recover "*annuum redditum*," and yet that was a *freehold rent-charge*.

ments descended.—It is now found more expedient to establish the annuity by a decree in chancery, directing an account of the arrears. Indeed the proceeding at common law is nearly obsolete. Such action however, when brought, is, we see, founded on the express *contract*, which created the annuity. This therefore I have set down as the first species of personal actions arising *ex contractu*.

II. A writ or action of *account* may be grounded either on express or implied contract. For it may be brought against a guardian in socage, a bailiff, a receiver, or a factor, and by or against the personal representatives of the original parties. Some extensions of this remedy are by statutes so ancient as to seem incorporated with the common law. A much later act has given the same relief to those who have undivided property in lands, as jointenants and tenants in common, and for and against their executors and administrators. If a man therefore receive the rents or debts of another, or be employed to pay over money to a third person, or be intrusted with goods to be merchan-

\* 1 Inst. 90. b. 172. a.

\* 2 Inst. 404.

\* Stat. 4 A. c. 16. § the last.

dised, and made profit of, in such cases this action lies; tho indeed the party aggrieved has usually choice of other remedies. The judgment first given is, that the defendant account from such a particular day; the declaration therefore states the period for which an account is expected. The defence to this action can hardly be any thing else than that the defendant never was receiver or the like, or <sup>w</sup> that he has already accounted. For <sup>x</sup> generally whatever else discharges him, but admits that he was once chargeable, should be pleaded before auditors, who after the first judgment above mentioned are assigned by the court to take the account. This proceeding is in the nature of a new action. Equitable allowances are made for inevitable accidents, as shipwreck <sup>y</sup> and the like: and the <sup>z</sup> defendant may in some measure clear himself by his own oath or averment. There is an appeal to the court in case of difficulty <sup>a</sup> or suspected <sup>b</sup> misconduct of the auditors. Otherwise what they find due is recovered by the final judgment. This action is very rare. It was

<sup>w</sup> Lut. 58.<sup>x</sup> 1 R. A. 121.<sup>y</sup> See 1 R. A. 124. 1 Inst. 89.<sup>z</sup> 1 R. A. 124. l. 35. 43. 2 Mod. 101.<sup>a</sup> See Lut. 49, 50.<sup>b</sup> See 2 Inst. 391.

however

however brought some years ago, where <sup>c</sup> the plaintiff had assigned a quantity of coral beads (as he alleged) to the defendant to be merchandised, and the returns to be made in diamonds. And the reason was, because this action is not limited to be commenced within six years, like an *assumpsit*, of which hereafter. In the instance alluded to, the <sup>d</sup> chief justice expressed his satisfaction at the revival of this action of account. But generally where this proceeding may be had, a suit in equity is a more eligible remedy.

III. An action of *covenant* is that which is brought to recover damages for some breach of covenants entered into by deed under seal. Covenants usually relate to time to come, as <sup>e</sup> a charter party of affreightment, containing the conditions of a certain voyage, and on which either the master or the merchants may maintain this action. It is admitted <sup>f</sup>, that a man may also covenant in respect to past transactions; or negatively, as that he hath not incumbered an estate. And I see not, why covenants may not be said to relate to

<sup>c</sup> 3 Will. 73: where see the proceedings at large.

<sup>d</sup> 3 Will. 117.

<sup>e</sup> 3 Lev. 41, 42.

<sup>f</sup> Plow. 308.

time present; for it is the constant language of deeds of alienation, that the alienor *has* lawful power to convey.

The cause of action here admits of no selection as to the remedy. If a <sup>s</sup> party seek redress for breach of covenants under seal, this course only can be pursued, unless where the deed contains a stipulated penalty for nonperformance; in which case it is not left to a jury to assess the damages; and consequently covenant will not lie, but an action of debt must be commenced.

In covenant the declaration necessarily recites the parts relied on of the instrument under seal; (which may be either an indenture or deed poll) and this is done with a *profert*, that is, an intimation, that the original is brought into court to be referred to, and which obliges the party to produce it at the trial. No <sup>h</sup> precise form of words is necessary to constitute a co-

<sup>s</sup> 1 R. A. 11 — Generally no *assumpsit* lies. (2 Cro. 506.) But if articles of partnership under seal be dissolved, and a balance struck, and an express promise to pay it, an *assumpsit* may be brought: (2 Durnf. & East 479 &c.) so if there be an express promise to pay a balance struck, tho the articles, containing a covenant to account, are subsisting. (2 Durnf. & East 483. n.)

<sup>h</sup> Dougl. 766.

venant.

venant. Any mode of expression, amounting to an agreement, if under seal, may avail. Thus the <sup>1</sup> words "hath demised" are sufficient to ground this action against a lessor, if the possession of his lessee be disturbed. It may be brought not only by or against the original parties to the deed, but in general by or against their representatives. Thus executors <sup>k</sup> and administrators, without being named in the deed, may sue and be sued in this form, provided the agreement relates to personalty, and is not confined to be performed by the covenantor himself; for in that case it may determine by his death. The same rule usually extends to an <sup>l</sup> assignee of the whole interest, *quia transit terra cum onere*: tho parcel <sup>m</sup> only of the premises are included in the assignment. But <sup>n</sup> generally the assignor

<sup>1</sup> 5 Co. 17. a. Carth. 98.

<sup>k</sup> 1 Cro. 553.

<sup>l</sup> 1 R. A. 521. 1 Cro. 553. Dougl. 461. n. 3 Willf. 27 &c. See also Dougl. 187, 8. n.—It is otherwise however of an *underlease*: (Vol. II. 285. See 3 Durnf. & East 393 &c. ft. 32 H. VIII. c. 34.) or where the covenants are only collateral to the intended plaintiff's interest in the land. (3 Durnf. & East 393 &c. 678 &c.)

<sup>m</sup> W. Jon. 245.

<sup>n</sup> 1 R. A. 522. 2 Cro. 523. 1 Sid. 447. W. Jon. 223. 2 Saund. 240.—*Express* covenants extend to both the original lessee and his assignee. But it seems an action of debt will not lie against an original lessee, after the lessor's acceptance of rent from the assignee, where there is only a covenant in law, as by the words *yielding and paying* &c. (1 Sid. 447. 2 Saund. 240. 1 Durnf. & East 92.)

also continues liable; for if a lessee covenant, that he and his assigns will repair a house demised, and then grant over the term to a stranger, and the house is out of repair, either of them may be sued at the election of the lessor notwithstanding his acceptance of rent from the assignee: and so for rent in arrear after the assignment. There are however some covenants of which the heir only of the covenantee can take advantage. As <sup>o</sup> if it be contracted to leave an estate in repair at the end of the term, tho the deed expressly names the executors and administrators of the lessor, and not the heir, yet the heir, and not the personal representative, shall have the benefit of this provision; for it is inseparable from the reversion. But <sup>p</sup> if the lessor were only tenant for life, a lease for years, made by him, absolutely determines by his death, and the subsequent owner of the estate cannot take advantage of the covenants in the demise.

The manner, in which the declaration must assign the breach of covenant, falls next under consideration. As to this the following case may be of practical application, as distinctly

<sup>o</sup> 2 Lev. 92.

<sup>p</sup> 2 Will. 143.

explaining

explaining the general rule. The <sup>1</sup> declaration set forth that the defendant covenanted to deliver fifteen hundred measures of salt petre by a certain day, but had made default. The defendant demands *oyer* <sup>2</sup> of the deed (that is, to have it set forth) in which was a proviso, that if any mischance happen by fire or water to disable him, he should be excused; and pleads, that he was disabled by accident of fire. This issue was found for the plaintiff; and then it was moved in arrest of judgment, that there was a variance between the deed on which he declared, and that produced in court, for the one was absolute, and the other conditional. But judgment was given in his favor; for he needed not to declare on more of the deed than the covenant, and it was on the defendant's part to shew the proviso, which went by way of defeasance of the covenants.—It is not <sup>3</sup> merely unnecessary, but improper, to state the whole of the deed. So much only as will intitle the plaintiff to his action must be shewn; and *that* part need not be literally recited, but may be set forth according to its substance and effect; tho it is usual and advisable to

<sup>1</sup> 1 Lev. 88.

<sup>2</sup> See 1 Saund. 9.

<sup>3</sup> Doug<sup>l</sup>. 667.

deviate very little from the expressions in the instrument. Thus in 'an action of covenant on a mortgage deed, it is sufficient to set out, that the defendant by indenture had demised certain premises therein mentioned, without enumerating them particularly, subject to such a proviso, stating the substance of the covenant and the *breach*: and the contrary practice of adopting needless and expensive prolixity will incur the censure of the court.—

A " *breach* may often be assigned in the words of the covenant; as if one engage to shew a sufficient record, the declaration may aver, that he did not shew a sufficient record, and this will neither be bad for uncertainty, nor as a negative pregnant, (a term explained in the last lecture) because it rests on the defendant to set forth what record he shewed. So if a \* man covenant, that he is seised of an indefeasible estate, it is a breach sufficiently assigned, to say, that he was not seised of an indefeasible estate, without specifying the particular defect of title. But ' the intent of the covenant, and not the words, is sometimes proper to be pursued. Thus <sup>z</sup> if a lessor covenant,

\* Cowp. 665. 727.

<sup>u</sup> Yel. 30. 39, 40.

<sup>x</sup> T. Ray. 14, 15.

<sup>y</sup> 1 Sid. 178. pl. 12.

<sup>z</sup> 1 Cro. 914. Hob. 35. Vau. 120, 1. 3 Durnf. & East

tenant, that his lessee shall during the term enjoy the premises demised, it is not sufficient barely to pursue the words by alleging that he did not or could not enjoy; for unless he was disturbed by *lawful* title, he has his proper remedy against the invader of his right. The breach ought also to be particular, where the circumstances of it are to be the measure of the damages. As if it be<sup>a</sup> covenanted, that an apprentice shall not waste his master's goods, the declaration should specify the quality and value of the goods wasted. But<sup>b</sup> such an assignment of a breach, as might be holden bad on a demurrer, may be aided by a verdict for the plaintiff; because it is supposed to be ascertained by the proof adduced at the trial.

In this<sup>c</sup> action the plaintiff might always assign in his declaration any number of breaches; because he is to recover damages in proportion to the several violations of the

584 &c: where besides recognizing the general doctrine, that such covenant extends only to *lawful* interruptions, it appears, that a seizure by the revolted states of America was no breach, notwithstanding their independance being subsequently acknowledged by this country. See also 1 Durnf. & East 671, 2, 3.

<sup>a</sup> 1 Lev. 94.

<sup>b</sup> T. Jon. 125. Skin. 344. 1 Lev. 183.

<sup>c</sup> 3 Cro. 176.

agreement.

agreement. But in an action of debt on a bond conditioned for the performance of covenants, it was formerly otherwise. For as one breach would intitle the obligee to the whole penalty, if more were assigned in the replication, (the usual place of their insertion) it was bad for duplicity. This distinction however is abolished by a statute<sup>d</sup> made at the close of the last century; whereby a plurality of breaches may in this case also be assigned on record. It must also be observed, that<sup>e</sup> in an action of covenant, on a general demurrer to the declaration, in which several breaches are assigned, the plaintiff shall be barred as to those which are defective, and shall have judgment as to the residue; whereupon a writ of inquiry, to ascertain his damages, is awarded.

It may now be considered, what<sup>f</sup> defence is to be made to an action of covenant. A release under seal is certainly a bar to this as

<sup>d</sup> 8 & 9 W. III. c. 11. § the last.

<sup>e</sup> 2 Saund. 380.

<sup>f</sup> Q. as to bankruptcy, pleaded to an action of debt for rent, the interest passing to the assignees under the commission. (1 Durnf. & East 86 &c.) In leases to traders it is therefore a prudent insertion, that on the lessee's committing an act of bankruptcy, whereon a commission shall issue, the lessor may re-enter, such proviso being good in law. (2 Durnf. & East 133 &c.)

to all other personal actions. But it<sup>e</sup> cannot be discharged by parol or any writing, not being a deed, except such new agreement has been carried into execution. The defendant may plead generally that the instrument declared upon is not his deed. But <sup>h</sup> to say in general that he has not broken the covenants is insufficient; there <sup>i</sup> cannot be issue taken on such indiscriminate averment; the defendant must answer to the breaches assigned, setting forth his performance, or shewing how he is discharged from the necessity of performance. Thus he <sup>k</sup> may plead *accord with satisfaction* made after the breach, that is an agreement (tho by <sup>l</sup> parol, as it seems) to be discharged on certain terms, farther alleging that such terms were afterwards duly complied with on his part. To an action of covenant for nonpayment of rent, or not repairing a house demised, it is a good

<sup>e</sup> 2 Willf. 86.

<sup>h</sup> 1 Lev. 183.—If the general issue *non infregit conventionem* can be pleaded at all *in this action*, it must perhaps be where the breach is affirmatively assigned. See 1 Inst. 303. b. 1 Lev. 303. 1 Cro. El. 749, 750. as to *bonds conditioned, &c.*

<sup>i</sup> Cowp. 578.

<sup>k</sup> Co. Ent. 117.

<sup>l</sup> However a variation, by parol, of the terms of an agreement under seal, can neither avail plaintiff or defendant in actions at law, tho such new dispensation may be a ground for resorting to a court of equity. (3 Durnf. & East 590 &c. & n.)

defence that the plaintiff accepted a surrender of the term: and to a<sup>m</sup> covenant, that the assignee of a lease should enjoy free from all arrears of rent, it was holden a sufficient answer on record, that the defendant left money in the plaintiff's hands for satisfying the demand. But<sup>n</sup> a reciprocal breach on the part of the plaintiff is not pleadable in bar, where the covenants are distinct and independent; for each party has his remedy, and the damages respectively incurred by such breaches may not be equal. Neither can<sup>o</sup> unliquidated damages, arising from such reciprocal breach of covenant, be pleaded by way of *set-off*. But<sup>p</sup> to an action of debt for rent, the defendant was allowed to plead in bar, a covenant whereby he was at liberty to deduct so much for charges: and the same, I apprehend, might be pleaded, by way of *set-off*, to an action of covenant; for this is not a mutual breach, but a liquidated pecuniary demand.

<sup>m</sup> 4 Mod. 249.

<sup>n</sup> 3 Lev. 41, 42. 2 Mod. 309. 3 Will. 387. Dougl. 690.

<sup>o</sup> Cowp. 56, 57; but q. as to such demands for which an *indebitatus assumpsit* would lie. See 2 Durnf. & East 32 &c.

<sup>p</sup> 1 Lev. 152.—This case seems cited 1 Bac. abr. 551, as clashing with the former doctrine, that reciprocal breaches of covenant cannot be pleaded in bar, but no breach is here alleged.

The general judgment for the plaintiff in covenant is that he recover the damages assessed by the jury. But it has formerly been said<sup>1</sup>, that if this action be brought against a lessor, and issue joined on the demise *for years*, judgment shall be only given, that the plaintiff recover his term.

IV. We are next to consider actions of *debt*; which may be brought, wherever a determinate sum is claimed as due; and for<sup>2</sup> an indeterminate demand, which may readily be reduced to a certainty; for it is not now understood to be necessary, that the plaintiff should recover the exact sum demanded. This form of action therefore is applicable to a variety of occasions. Such as arise from contract are founded on deeds under seal, or on agreements without that sanction. The latter sort are called simple contract debts. Thus money lent, the contents of a promissory note or bill of exchange, the agreed price of goods delivered, or rent<sup>3</sup> in arrear, *may be demanded*

<sup>1</sup> 2 Leon. 104. 1 Cro. 214.

<sup>2</sup> T. Jon. 184. 3 Lev. 429. 2 Keb. 225. pl. 80. 2 Cro. 618. Rands v. Peck. Dougl. 6.—It is said, 2 Com. dig. 528, to lie on a *quantum meruit*.

<sup>3</sup> Lit. § 58. 72.

in this form. But as the landlord has always a better remedy by distress, and as in the other cases an *assumpsit* (of which I shall speak in the next lecture) will lie, the action of debt is seldom brought on simple contracts. For<sup>t</sup> in cases of simple contract, (except for rent, tho on a parol demise) the defendant has the privilege of waging his law. There is however no reason for declining this course, and it is indeed the only action, when the debt arises by *specialty*, as a bond or recognizance. For then the defendant cannot wage his law, and the plaintiff may as easily prove the whole as any part of his demand. And<sup>u</sup> actions of debt on bond may be brought against executors or administrators, tho not named in the obligation; but not against an heir, without being specially charged. Actions of debt may also be brought by the assignees of<sup>x</sup> bail and<sup>y</sup> replevin bonds, in pursuance of particular statutes. And if an indenture of covenant contain a stipulated penalty for nonperformance, the remedy (as I have already ob-

<sup>t</sup> 1 Inst. 295. a.

<sup>u</sup> Dy. 23. a.—If however no demand have been made, nor interest paid, on a bond for twenty years, nothing is recoverable upon it.

<sup>x</sup> St. 4 A. c. 16. § 20.

<sup>y</sup> St. 11 G. II. c. 19. § 23.

served)

served) is by an action of debt for that specific sum. By the same method the<sup>2</sup> arrears of an annuity or rent-charge may be recovered.

Actions of debt may also be brought, where a contract cannot always be supposed to intervene; but as they have the same denomination, it seems convenient to mention them in the same discourse. Thus debt may be founded on a judgment in a former action; in which case the *original* foundation of the new suit is that of the preceding one; but no other evidence is necessary besides the record. And sometimes actions of debt arise clearly *ex delicto*. For this is the mode of suing for those penalties, which are inflicted by numerous statutes, as consequent on certain transgressions and omissions. The several acts of parliament direct to whom the forfeitures shall be due, as sometimes wholly to the party aggrieved, or to the informer; sometimes a moiety is to be accounted for to the king; sometimes a proportion is allotted for the use of the parochial poor. The plaintiff, wherever a part only of the penalty can be-

<sup>2</sup> Co. ent. 119. a. b. 120. a. Hard. 332.

long to him, is said to prosecute in a *qui tam* action, the <sup>a</sup> process and declaration expressing that he sues as well for the king, or the poor of the parish, as for himself. The declaration in these cases usually begins with reciting the essential parts of the statute, then it proceeds to the offence and forfeiture, and lastly expresses, that an action hath accrued to the plaintiff to demand and have the sum so forfeited, which however the defendant hath not paid. If there be <sup>b</sup> a distinct proviso in the act, which may perhaps be an excuse from the penalty, that should properly come from the defendant by way of special plea, or as <sup>c</sup> proof on the general issue; but if <sup>d</sup> it be incorporated with the enacting clause, on which the plaintiff proceeds, he must set it forth in his declaration, and state, that the party sued is not within any of the exemptions. In <sup>e</sup> such *qui tam* action, the plaintiff is liable to a nonsuit; for it is the suit of the informer, and not of the king. All these <sup>f</sup> prosecutions on penal statutes must be laid in

<sup>a</sup> Burr. 2417.

<sup>b</sup> This is analogous to the rule in covenant. (Ant. 89.)

<sup>c</sup> 2 R. A. 683.

<sup>d</sup> 1 Durnf. & East 141 &c.

<sup>e</sup> Lut. 196. Sav. 56. 3 Lev. 398.

<sup>f</sup> St. 21 J. I. c. 4.

the proper county, where the offence was in fact committed.

There are other occasions, in which actions of debt may be considered as arising *ex delicto*, besides those founded on the general statutes of the realm. The penalty for transgressing any by-law of a corporation, like the forfeitures inflicted by acts of parliament, is recoverable in this form. The same<sup>e</sup> method may be used for enforcing payment of an amercement assessed in a manerial court. Lastly if<sup>h</sup> any officer intrusted with the custody of a prisoner, against whom judgment has been obtained, permit his escape, an action of debt is the proper remedy; in which the<sup>i</sup> very sum for which the party is charged in execution is to be recovered against such officer; but<sup>k</sup> against his executors the suit is not *originally* maintainable, that is, where judgment

<sup>e</sup> Co. ent. 118. a. & c. 2 Saund. 66, 67. 1 Leon. 203. — But see Carth. 183, 4; where it is only said, "the court seemed to incline against the action." In the same book 190, in a case on a different subject, we find, "but the court were not satisfied with the action." A very imperfect way of reporting!

<sup>h</sup> In 1 Saund. 218, this action is referred to the common law; but in 2 Inst. 382. & 2 Durnf. & East 129. 132, to st. Westm. 2, 13 E. I. c. 11. & 1 R. II. c. 12.

<sup>i</sup> 2 Durnf. & East 129. 132.

<sup>k</sup> 41 Aff. pl. 15. Dy. 322. a. b. 1 R. A. 921.

was not had against the testator in his life time.

It remains to be seen what may be pleaded to an action of debt. The general issue to debt founded on a judgment or recognizance is, that there is no record of such judgment or recognizance; to debt on bond, that it is not the defendant's deed; and in other cases, that he owes or detains<sup>1</sup> nothing. In<sup>m</sup> debt \*for rent, on an indenture, the defendant may \*also plead generally, that nothing is in arrear: tho it is otherwise, in an action of covenant for nonpayment of rent, because such plea admits the covenant broken, and only tends to mitigation of damages. To an action of debt, arising from simple contract, it may be specially pleaded, that it did not accrue within six years. For by the<sup>n</sup> statute of limitations debts must be sued for within that time, unless where they are founded on an instrument under seal, or something of a still superior force, as on the statute<sup>o</sup> for setting out tithes, or<sup>p</sup> other matter of record. But actions of

<sup>1</sup> Hard. 332, 3.—In debt on a penal statute, the plea of not guilty is, at least, not a mere nullity. (1 Durnf. & East 462.)

<sup>m</sup> Cowp. 588.

<sup>n</sup> 21 J. I. c. 16.

<sup>o</sup> 2 & 3 E. VI. c. 13. 3 Cro. 513. 1 Saund. 38.

<sup>p</sup> 1 Mod. 245. 2 Sho. 79.

debt

*He may also plead, "non est factum"*

debt on penal laws must be brought within a much shorter space. The limitation, by a<sup>a</sup> general law, for an informer to begin his suit is one year after the offence committed. The particular acts frequently affix a different period. If this<sup>r</sup> kind of action to recover a forfeited penalty be not prosecuted in due time, the defendant may take advantage of it on the general issue: tho where he would avail himself of the lapse of six years in debt on contract, that defence must be set forth on record in a special plea.

Other pleas in debt are most commonly such as relate to bonds, and render them of no effect. Thus that the defendant was an infant, under the age of twenty-one years, must<sup>s</sup> be specially pleaded; and cannot (as coverture may) be taken advantage of on the general plea, that it is not his deed. Thus also that the defendant was constrained to execute the bond by *duress*, as it is called, viz. threats, ill treatment, or imprisonment, must be<sup>t</sup> particularly pleaded, and cannot be given in evidence on the general issue. The same rule obtains<sup>u</sup>, where the bond is va-

<sup>a</sup> St. 31 El. c. 5.<sup>r</sup> 1 Sho. 353.<sup>s</sup> Burr. 1805.<sup>t</sup> 5 Co. 119. a.<sup>u</sup> Ibid.

cated by act of parliament; as if given on a<sup>x</sup> usurious contract, or for money unlawfully won in<sup>y</sup> gaming, or to a<sup>z</sup> sheriff for ease and favor to his prisoner; these matters must be specially alleged in the bar. But you cannot set forth by way of plea to a bond, in order to defeat it, any agreement by parol or not under seal, repugnant to the written condition: as<sup>a</sup> if the condition be simply for payment of money, you cannot aver, in pleading, that the bond was given as an indemnity, or the like. “I have not seen (says<sup>b</sup> Brian chief justice in the first year of Henry the seventh) in any case in the world, how one can avoid a specialty by naked matter in fact concerning the same deed, if so be that the deed was good at the beginning.” If however<sup>c</sup> the bond were not good at the beginning, but void at common law, as having been given in pursuance of a wicked and iniquitous compact, this may be pleaded in defeasance of the instrument. Lastly, the defendant may plead to a bond payment thereof at the time appointed, or subsequent<sup>d</sup> thereto,

<sup>x</sup> St. 12 A. ft. 2. c. 16.<sup>y</sup> St. 16 C. II. c. 7. 9 A. c. 14.<sup>z</sup> St. 23 H. VI. c. 9.<sup>a</sup> Cowp. 47. See ant. 93 & n.<sup>b</sup> Yearb. 1 H. VII. 16. b.<sup>c</sup> 2 Will. 351.<sup>d</sup> St. 4 A. c. 16.

if it were antecedent to the action; which is an indulgence introduced by the statute for the amendment of the law; for <sup>e</sup> the rule formerly was otherwise: payment <sup>f</sup> before the appointed time is still an informal plea, and bad on demurrer, tho such demurrer be put in to the replication; for the first fault was made by the defendant.

The old reporters speak of an action of debt, in which not money, but other goods are demanded. As <sup>g</sup> if a man be bound by a writing under seal to deliver a certain quantity of wares and merchandises by a day prefixed, and there be no stipulated penalty for omission, the obligee may sue this action. In such <sup>h</sup> cases it was generally the course for the declaration to state that the defendant *detained*, and not that he owed and detained; which technical nicety also antiently prevailed where, an <sup>i</sup> executor or <sup>k</sup> heir was plaintiff in right of his testator, or ancestor; and where <sup>l</sup> foreign money, not <sup>m</sup> current here, was

<sup>e</sup> 2 Sal. 508.      <sup>f</sup> 2 Willf. 150.      <sup>g</sup> Yel. 71.

<sup>h</sup> F. N. B. 273. Hal. ibid. 1 R. A. 604. Br. t. dette pl. 211.

<sup>i</sup> 1 R. A. 602. 5 Co. 31. b.

<sup>k</sup> Hal. F. N. B. 273. marg. As for the arrears of an annuity in fee.

<sup>l</sup> 2 Cro. 618. Rands v. Peck.

<sup>m</sup> Noy. 13.

the subject of demand: but without this exactness, if the foreign money had been declared to amount to so much according to the English standard, this was good, and of such value the jury were to judge.

The judgment in debt is for the money or<sup>a</sup> goods demanded, and if the goods cannot be had, then for their value, which, if not found by the original verdict, may be ascertained by a writ of inquiry, and verdict thereon.

V. *Detinue* has a very close affinity to the last-mentioned species of debt, and is indeed hardly distinguishable from it, except perhaps that in detinue the property is supposed to be vested before action brought. Where a plaintiff purposes to recover a specific chattel, this action may be sued; and<sup>b</sup> it may arise either *ex contractu*, as bailment, or the accidental possession and wrongful detention of the goods. It is requisite, that the thing detained may be certainly evidenced; thus<sup>c</sup> money, except in a bag or chest, cannot be so recovered. But yet it is not absolutely

<sup>a</sup> Yel. 71.<sup>b</sup> 1 Inst. 286. b.<sup>c</sup> Ibid.

certain,

certain, that the thing itself will be recovered, tho judgment be given for the plaintiff; for instance, not where there has been a valid sale. The judgment therefore always is for recovery of the specific chattel, or of its value: and to this end, the verdict may properly find the value, as well as the issue joined between the parties. If there be an apprehension of the specific chattel being defaced, as a curious piece of antiquity, or of its being transferred by sale, an injunction obtained in a court of equity is more expeditiously and effectually remedial than this action of detinue. Where the plaintiff would have been satisfied with a compensation in damages, he was not accustomed to bring this action, but *trover*; (of which I shall speak hereafter) because the defendant in detinue might have waged his law. But that liberty is not allowed in detinue for charters and title deeds of an estate; which partakes of the nature of a real suit; tho it may be barred by a release of personal actions; and therefore

3 Bl. Com 152.

<sup>a</sup> Co. ent. t. detinue.<sup>r</sup> 3 Wms. 390, 1.<sup>1</sup> Inst. 295. a.<sup>2</sup> Ibid. 286. b.<sup>u</sup> Ibid.<sup>x</sup> Ibid.

belongs

belongs to the present class. This' action was brought in the early part of the present reign for the recovery of an indenture of lease, being the proper specific remedy at common law.

7 *Barker and another v. Green* B. R. P. 8 G. III.—The form of the declaration was as follows. “ Derbyshire to wit. Samuel Barker and Mary Gall widow complain against Philip Green, being, &c. of a plea that he render to the said S. & M. an indenture of lease of them the said S. & M. which he unjustly detains &c. For that the said S. & M. on 1 May 1765, at D. in the county of D. were lawfully possessed of an indenture of lease, bearing date the 3 March 1707, and made between one Thomas Burley of the one part and one Matthew Wilcocks of the other part, by which said indenture the said T. B. demised to the said M. W. his executors, administrators and assigns, a certain house and lands situate, lying and being in Hatherfage, in the county of D. for and during the natural life of one G. G. and also for the term of threescore years after the death of the said G. G. : and being so possessed, they the said S. & M. afterwards to wit, on the same day and year aforesaid, at D. aforesaid, delivered the said indenture to the said P. to be safely kept by the said P. under the following condition, to wit, that whenever the said S. & M. or either of them, should pay, or cause to be paid, to the said P. the sum of five pounds, the said P. should render the said indenture to the said S. & M. : and the said S. & M. in fact say that they the said S. & M. afterwards, to wit, on the 1 May 1767, at D. aforesaid, in the said county, did pay to the said P. the said sum of five pounds:—nevertheless the said P. (altho often requested) hath not rendered the said indenture to the said S. & M. or either of them, but hath wholly refused, and yet doth refuse, to render the same to them or either of them, and unjustly detains the same from them. To the damage of the said S. & M. of one hundred pounds. And thereof they bring suit &c. Pledges &c.

The remaining species of personal actions, which may arise *ex contractu*, is called an *assumpsit*; and being very various, and of more frequent use than any of the foregoing, will require a more copious discussion.

## LECTURE XLVI.

*Of actions of assumpsit founded on some writing.*

OF personal actions arising *ex contractu*, the only remaining species to be treated of, and of all the most frequent, is called an action *upon promises*, or of *assumpsit*, from the emphatic use of that word in the plaintiff's declaration. While the proceedings were in Latin, the declaration stated, that the defendant, for some cause or *consideration* therein expressed, "*super se assumpsit*," (in the language now introduced) "*undertook and faithfully promised*," to do or to forbear some act affecting the plaintiff, on the breach of which promise, that is to recover a pecuniary satisfaction for the damage thereby sustained, this remedy is pursued. In all actions of *assumpsit* therefore the declaration must shew such breach or nonperformance of the promise.

Actions of *assumpsit* are either founded on some writing, or on unwritten promises, positive

fitive or implied. As to writings however it must be remembered, that if<sup>a</sup> the undertaking be by deed under seal, no *assumpsit* can be brought, but either debt, or covenant in its room, as they were distinguished from each other in the last lecture. This rule is built on the general polity of our antient law, by which particular remedies were provided for different wrongs, that causes might not be brought into court confusedly and unmethodically, and that the record might at once clearly ascertain the matter to be tried.

I proceed now to consider such written instruments, as may be the foundations of actions upon promises, or of *assumpsit*.

In general, all writings unsealed, in which any promise or contract is expressed, may ground an *assumpsit*. Of these the most usual are *bills of exchange, and promissory notes*.

The convenience of paper credit, especially in regard to foreign commerce, was<sup>b</sup> very early discovered; the uniform custom of mer-

<sup>a</sup> 1 R. A. 11.      <sup>b</sup> 2 Black. comm. 466, 7. Montesq. sp. l. b. xxi. c. 20. Schomb. mar. l. of Rhodes 82. n.

chants gave it a gradual sanction; and it obtained an easy admittance into the laws of England. Bills<sup>c</sup> of exchange however seem to have been long confined to cases, where one of the parties was a merchant stranger, residing abroad and trading to this country. It was<sup>d</sup> afterwards adjudged unnecessary, that the drawor should be really a merchant, and a bill, transmitted by a young gentleman on his travels, was allowed to be of the same validity. At length little, if any, distinction was left between foreign and inland bills of exchange. For by a<sup>e</sup> statute passed at the close of the last century, inland bills may after<sup>f</sup> *acceptance* in writing by the person, to whom they are addressed and presented, be *protested*, which is to charge the person, from whom they were received, with interest and expences: and if they be lost or miscarry, the drawor, being indemnified, is obliged to give

<sup>c</sup> 2 Cro. 306, 7.

<sup>d</sup> 2 Vent. 295. 310.

<sup>e</sup> 9 & 10 W. III. c. 17.

<sup>f</sup> But an acceptance conditionally, or by parol, is sufficient to charge such acceptor: (2 Will. 9. See Cowp. 574. Dougl. 299. 1 Durnf. & East 182 &c.) so if the acceptance be after the time of payment is elapsed, or by a stranger, for the honor of the drawor. (Lord Raym. 575.) An action also lies for the drawor against the drawee, after he has accepted a bill of exchange. (1 Will. 185.)

a new bill of the same tenor. By a subsequent law<sup>e</sup>, no protest is necessary, except the bill amounts to twenty pounds: and<sup>h</sup> any such bill, taken in satisfaction of a debt, is to be esteemed full and complete payment, and the creditor is to take his due course for the discharge thereof, and to protest the same for nonpayment or nonacceptance, and not to resort to the original foundation of his debt. The same law<sup>i</sup> allows promissory notes to be assignable and<sup>j</sup> negotiable, by indorsement, like bills of exchange.—Formerly<sup>k</sup> it was thought, that if a bill of exchange be made payable to a person particularly named “or bearer,” it was not assignable by the contract, so as to enable the indorsee to bring an action against the drawee; but that those words were only *an authority*

<sup>e</sup> St. 3 & 4 A. c. 9. § 7.

<sup>h</sup> But it has been holden, that where A. drew a bill on C, in favor of B, which C. did not accept, and B. gave no notice of such nonacceptance to A, that there was an end indeed of the bill, but B.'s debt against A. was not extinguished. (1 Durnf. & East 405 &c: see *ibid.* 655.)

<sup>i</sup> See 1 Willf. 262.—By the custom of merchants, indorsements may be made *by* executors or administrators: (Str. 1260.) or *to* them as such. (1 Durnf. & East 487 &c.)

<sup>j</sup> It is thought a suspicious circumstance, requiring explanation, if notes or bills be negotiated after due. See 3 Durnf. & East 80 &c. 83. n.

<sup>k</sup> 3 Lev. 299. Sal. 125.

to pay it to such bearer, by whatever means it came, generally, into his possession. But this doctrine is <sup>1</sup> effectually overruled; and an action may be maintained against the drawor either by a bearer or indorsee, provided such plaintiff can prove himself intitled to the contents for a valuable consideration.

By the <sup>m</sup> custom of merchants, he to whom a bill is payable, commonly called the holder, ought, within a reasonable time after his receipt of it, to present the bill to him, to whom it is directed, for his acceptance, and such person ought also, within a reasonable time, to accept the bill, or refuse payment of it; and <sup>n</sup> reasonable notice ought to be given to drawors and indorsors of nonpayment or non-acceptance by those liable in the first instance.

<sup>1</sup> Burr. 1516 &c. 3 Durnf. & East 182. & 182, 3.—Acceptance is evidence of the drawee's having received value from the drawor. (Ibid.)

<sup>m</sup> 2 Wils. 353. Burr. 674 &c.

<sup>n</sup> Dougl. 515. Otherwise an indorser will be discharged. (1 Durnf. & East 712 &c.)—The object of such notice of a bill being dishonored is that the drawor may save himself harmless by withdrawing any effects which he has in the hands of the drawee: generally therefore, if he have no effects so outstanding, want of notice will be no objection. (1 Durnf. & East 408 &c. 714. 2 Durnf. & East 713 &c.)

The persons ° so first to be resorted to for payment are the maker of a promisory note, and the drawee of a bill of exchange. A demand on these respectively is necessary to support an action against an indorser: but no such demand need be proved on the drawee of a bill.

The declaration in actions on bills of exchange, after stating the particular facts, adds, “ by reason whereof, *and by the custom of merchants*, the defendant became liable to pay, and being so liable *undertook and faithfully promised* to pay the contents of the bill.” Such promise, where the defendant is an acceptor of a bill of exchange, or a maker of a promisory note, is positive and direct: in the case of others, the imputed or implied promise is rather circuitous, and conditional, viz. that due diligence be used to obtain payment from the drawee, without giving him time or credit, and that those endeavors fail. So ° if time or credit be given to the maker of a promisory note, the indorser is discharged.

• Burr. 674 &c. Dougl. 679 &c. 1 Will. 47.

° 1 Durnf. & East 167 &c.

If two <sup>a</sup> persons make their promisory note, whereby they jointly *or* severally undertake to pay the contents, both or either may be sued at the plaintiff's election. And altho a plea of the <sup>r</sup> statute of limitations (viz. that the promise was not made within six years) may be set up against this action, when founded on *written* as well as unwritten undertakings, yet an acknowledgment, or payment of interest, is an answer to that defence, tho it comes from one only of several makers of a promisory note; and it will substantiate the instrument, and maintain an action against the others. On the other hand, if <sup>r</sup> two persons draw a bill of exchange payable "*to our order,*" this indeed was thought by the court of king's bench to render them so far partners as to that transaction, (tho admitted not to be so otherwise) that an indorsement by one of them was binding and effectual: but the cause was finally determined by a special jury in London, who were decidedly of opinion, that by the usage of merchants and bankers, the indorsement ought to have been by both the payees. A signature, however, by due

<sup>a</sup> Str. 76. Cowp. 832. tho Str. 819. cont.

<sup>r</sup> 21 J.1. c. 16. Dougl. 652, 3.      <sup>•</sup> Dougl. 653, 4. n.

authority,

authority, according to the firm of a partnership, is in constant use.

The cursory mention of the statute of limitations may lead us to inquire, in what other manner bills and notes may become of no effect. A note originally void may be rendered valid by indorsement. As<sup>t</sup> if a note be given by a wife to her husband, and indorsed over by him; or if made by an "infant, and indorsed over, an action may be maintained against such indorsors. And<sup>x</sup> even if a forged bill be accepted, and then negotiated for a valuable consideration, and paid, the innocent receiver of the contents will not be obliged to refund. But on the other hand<sup>y</sup>, bills and notes, expressly vacated by

<sup>t</sup> 2 Atk. 181, 2.

<sup>u</sup> Such note is only voidable, and may be revived by a promise of the infant after he comes of age. But a security void in its creation cannot be substantiated by a subsequent promise. (2 Durnf. & East 766.)

<sup>x</sup> Burr. 1354.—An acceptor is liable, tho the bill be forged: for an acceptor is supposed only to look to the hand-writing of the drawer, which he is afterwards precluded from disputing. Therefore in such action, the *hand-writing of the first indorser must be proved.* (1 Durnf. & East 654, 5. See 3 Durnf. & East 174 &c. 481 &c; where bills payable to a *fictional* payee are considered as payable *to bearer*, in favor of an innocent indorsee for valuable consideration.)

<sup>y</sup> Dougl. 736. Str. 1155.

the statutes against <sup>z</sup> usury and <sup>a</sup> gaming, are absolutely void in the hands even of an innocent indorsee.

In these actions of *assumpsit* on bills and notes, the contents thereof, with interest as specified, or, where there is no specification, after the time, and a demand of payment, and with the charges also of <sup>b</sup> protesting, may be recovered as damages to be assessed by the verdict.

Policies of insurance are another kind of written engagements, which give frequent occasion to actions of *assumpsit*. In these contracts, the insurer or underwriter agrees for a stipulated premium to repay a much larger sum, if a particular event, as the loss of a ship and its cargo, or the death of some individual within a certain period, shall take place. Bynkershoëk's <sup>c</sup> definition, or rather description, of naval policies is, "*pro rerum alienarum securitate fidei suæ interpositio; quâ, sublatâ domini personâ, earum periculum fidejussor sus-*

<sup>z</sup> 12 A. fl. 2. c. 16.

<sup>a</sup> 16 C. II. c. 7. 9 A. c. 14.

<sup>b</sup> 6 Mod. 80, 81. Str. 910. Sal. 131.

<sup>c</sup> Q. j. p. l. i. c. 21.

*cipit pro certo pretio.*" This therefore is an evident advantage and encouragement to commerce, as the merchant, contenting himself with a more moderate profit, is guarded against any ruinous misadventure. The<sup>d</sup> origin of the system is attributed to the emperor Claudius, who, in a time of dearth, besides other incentives to importation, engaged to bear the loss himself, *si cui quid per tempestates accidisset*. The emperor's undertaking was gratuitous, and extended only to one species of danger, not comprehending any loss by pirates or other means. Our modern insurances, on the other hand, engaged in for a proportionate premium, are usually more general in their object. The merchant may insure against perils of the sea, decays of the ship and furniture, fire, *barratry*\* of the master or mariners, mutiny of the latter, and every species of capture and detention, or against some only of these casualties. The voyage also may be long and hazardous; it may be a time of open war or suspected hostilities; and the ship may be at liberty to depart without convoy. On such

<sup>d</sup> Bynk. q. j. p. l. i. c. 21.

\* 1 Durnf. & East 255 &c. 326 &c. 3 Durnf. & East 277, 8.

considerations, the rate <sup>f</sup> or proportion of the premium depends.

In what cases, and how far, insurers shall be liable, is governed chiefly by the custom of merchants; and some at least of that profession are usually sought to be impanelled on the jury to try these suits. This may be thought of greater necessity, because it has been <sup>g</sup> said, that a witness cannot be admitted to prove the law of merchants; for it is the law of the land. But usage, which seems, when it is not unreasonable, to constitute the mercantile law <sup>h</sup>, is frequently given in evidence.

The cases that have occurred on policies of insurance are long and numerous. I shall chiefly select such rules as seem of most general extent and application.

<sup>f</sup> This is expressed in the policy, (as twelve guineas for insuring one hundred pounds) and then each underwriter subscribes his name, and opposite to it, whatever sum he proposes to insure. The business is usually transacted by brokers; and where the principal resides in Great Britain, it is necessary, that his name, or that of the agent, as such, should be inserted in the policy; where the principal resides abroad, the name of the agent must be so inserted. (St. 25 G. III. c. 44. 1 Durnf. & East 313 &c. 464 &c.)

<sup>g</sup> Burr. 1669.

<sup>h</sup> Dougl. 654. n.

It

It is affirmed<sup>1</sup>, that a ship or goods, which have already perished, cannot be insured, without the words, "lost or not lost," inserted in the policy: but<sup>k</sup> tho the expression, "lost or not lost," be used, yet if the party insured knew of the loss, the policy is void.

It is a general rule<sup>1</sup>, that a change of the intended voyage defeats the insurance. But it hath been<sup>m</sup> adjudged, that the assured shall recover for what damage happened before the time of deviation, for the policy from that time only is discharged. In like manner an<sup>n</sup> intention to deviate does not excuse the insurers, if the ship be lost before actual deviation; but<sup>o</sup> it is otherwise, if the voyage originally intended be different from that displayed in the policy. If<sup>p</sup> indeed the voyage be according to the usage, it is not a deviation fatal to the policy. For where a ship bound from Bremen to London went to the Elb, which was out of the way, for the

<sup>1</sup> 1 Sho. 324.<sup>k</sup> Ibid.<sup>1</sup> Ibid. Burr. 347.<sup>m</sup> 2 Sal. 444.<sup>n</sup> Str. 1249. Dougl. 361.

<sup>o</sup> Dougl. 16.—Whether there was such material difference, became the question, where a ship was driven out of her loading port into another, in which she completed her lading. (1 Durnf. & East 22 &c. See 2 Durnf. & East 30 &c.)

<sup>p</sup> 2 Sal. 445. Burr. 348. Dougl. 361. Cowp. 601.

fake of joining the convoy, the plaintiff had the benefit of his insurance.

In general however a strict observance of the articles is requisite. For if it be intended otherwise, as Grotius<sup>a</sup> observes, "*solet diserte poni, ut si contra hanc aut illam partem quid fiat, cætera non eo minus rata maneant.*" Therefore if goods insured be changed from one ship expressly named to another, or if a ship, contrary to agreement, depart without her convoy, (that is, the usual convoy appointed for the voyage) or desert it, the policy is dissolved. But if such<sup>u</sup> vessel be separated from the convoy by tempest, the benefit of the insurance shall remain.

Another<sup>x</sup> case, in which the like principle of casual necessity prevailed, happened, where the mariners compelled the master to return to the port he sailed from, this was adjudged to be not a deviation of such a kind, as to excuse the insurers from compensating the loss. And under this head, it may be ob-

<sup>a</sup> De j. b. & p. l. iii. c. 19. § 14. 4 Mod. 60.

<sup>r</sup> 1 Sho. 325. Burr. 351.

<sup>s</sup> 3 Lev. 321.

<sup>t</sup> Dougl. 72 & c. 736.

<sup>u</sup> 3 Lev. 321. Dougl. 74. 271.

<sup>x</sup> Str. 1264, 5.

served,

served, that <sup>1</sup> if a ship be warranted to depart on or before a particular day, and insured against detainments even by very general words, it is no excuse, that the voyage was retarded by an *embargo*.

A ship <sup>2</sup> was warranted to depart with convoy, not meeting with which at the Downs, she proceeded to Spithead, where a general convoy was appointed for that trade; in the way thither she was taken. The chief justice, and the jury, composed of merchants, thought the underwriters liable, and that the ship was under their insurance to a place of general rendezvous; for otherwise they should have particularised, from whence she should depart with convoy. This precaution was actually taken in a more recent case <sup>3</sup>, a ship being insured from London to Halifax in Nova Scotia, warranted to depart with convoy from Portsmouth. Before she arrived there, the convoy was gone: the insurance therefore for the remainder of the voyage being at an end, the question was, whether the whole premium should be retained by the

<sup>1</sup> Cowp. 784. See Dougl. 357. 366. n.

<sup>2</sup> Str. 1265.

<sup>3</sup> Burr. 1237.

underwriters.

underwriters. It was considered, that if the risque were not incurred, tho by the neglect or fault of the party insured, yet the insurers were not intitled to retain the premium. Here the contract consisted, as it were, of two parts, and the premium might be so divided, as relative to distinct voyages. The court therefore held, that so much of the premium, as was equivalent to the risque from Portsmouth to Halifax, should be restored. Where <sup>b</sup> the risque has never been run, to whatever cause it may be owing, the premium shall be returned. But <sup>c</sup> if the risque have once commenced, and the contract be intire and indivisible, no part of the premium can be redemanded by way of apportionment.

From hence we may advert to the regular duration of the contract of insurance. It has been <sup>d</sup> determined, that an insurer is not liable, where a vessel has been moored twenty-four hours in safety at her port of destination, tho the loss arise from some damage sustained during the voyage; any more than on an insurance on a life for a year, where the party dies after the expiration of it, of a wound re-

<sup>b</sup> Cowp. 668.<sup>c</sup> Ibid.<sup>d</sup> 1 Durnf. & East 260, 1.

ceived within that period. In respect to goods insured, it has been \* decided, that if the policy be made, "until the ship shall have ended and be discharged of her voyage," arrival at the port, to which she was bound, is not a discharge, until she is unladed. In a subsequent<sup>f</sup> case, goods were insured to London, and until the same should be safely landed there: when arrived at that port, the owner sent his lighter, and received the goods; but before they reached land, they were damaged, and the insurer was sued. For the defendant it was insisted, that the accident happening after the owner had the goods in his possession, it was a loss after the insurance was ended. On the other side it was argued, that during all the voyage it might as well be said, the goods were in the possession of the party assured, who took the ship to freight, and whose servant the master was to this purpose as much as the lighterman. But the chief justice held, the insurer was discharged. He said, it would have been otherwise, if the goods had been sent by the ship's boat, which is considered as part of the ship and voyage. And the jury, which consisted of merchants,

\* Skin. 243.

<sup>f</sup> Str. 1236.

thinking

thinking it turned upon that distinction, brought in a verdict for the defendant. What shall be taken to be part of the voyage was again debated, where <sup>s</sup> an East India ship and its appurtenances were insured against fire and other perils to any ports and places beyond the Cape of Good Hope, and back to London. At Canton the ship stayed to clean and refit, the sails and furniture were taken out and lodged in a warehouse, according to the well-known, prudent and established usage, but were accidentally burnt. This was holden to be a loss within the protection of the policy; for what must necessarily be understood makes a part of it, as much as what is expressed. The essential means and necessary intermediate steps must be taken to be insured, as well as the professed end. This therefore was a loss within the voyage, tho strictly speaking it happened on land. Much stress in this case was laid on the usage, and on the supposition of that usage being known. For <sup>h</sup> underwriters are presumed to know the nature of the trade, to which the insurance relates. The mercantile law is the same all over the world. And from considering the

<sup>s</sup> Burr. 341.<sup>h</sup> Dougl. 510.

nature and utility of these contracts, our courts have established a system of equitable construction<sup>1</sup> on the antient and inaccurate form of words, in which the instrument is traditionally conceived. Thus it has been determined, that<sup>2</sup> a liberty to cruise for six weeks means six weeks successively from the commencement of the cruise: and that<sup>3</sup>, if a ship insured be warranted as neutral property, this relates to the beginning, and does not include the whole duration of the voyage. But<sup>4</sup> where a ship and property, warranted neutral, were not so at the time of the insurance, the defendant pleaded the general issue, paid the premium into court in due time, and had judgment.

That general convenience, which is regarded in the construction of these instruments, is very inconsistent with what are called wagering policies, in which the party

<sup>1</sup> Dougl. 270.

<sup>2</sup> Dougl. 527.

<sup>3</sup> Dougl. 732. 3 Durnf. & East 477 &c.—A very nice case lately occurred on an insurance of goods, “lost or not lost;” and at the bottom of the policy was added, “warranted well, Dec. 9, 1784.” The ship was lost on that day several hours *before* the insurer subscribed the policy. Yet he was holden liable, the warranty being satisfied by the safety of the goods on *any part* of that day. (3 Durnf. & East 360, 1.)

<sup>4</sup> Burr. 1419, 1420.

insured

insured has no interest in the property professedly protected by the insurance, and which, by a statute of the last reign, are wisely prohibited, except on privateers, and on merchandises from ports belonging to Spain or Portugal. The same act restrains all re-assurances, unless expressly declared so to be, and unless the former underwriters are insolvent or bankrupts. Before the introduction of these wagering policies, it was established, that a man should not recover more than he had lost. But the proportion, in which it should be paid, seems unsettled. According to one decision<sup>o</sup>, an underwriter, who subscribes his name after the whole value is insured, shall not be liable to make compensation for the goods, if they be lost or damaged; but may return the premium, which he received. Which rule was said to prevail, though some of the former insurers prove insolvent. It was also laid down, on a parity of reason, that if the cargo amount to nine hundred and fifty pounds, and ten underwriters insure each one hundred pounds, the last should contribute fifty pounds only for the loss. But it seems

<sup>o</sup> 19 G. II. c. 37. See 1 Durnf. & East 308 &c. 2 Durnf. & East 161 &c.

<sup>o</sup> 1 Sho. 132.

more consistent with natural justice, and it has the sanction of a more modern opinion, that <sup>p</sup> the underwriters should all of them rateably contribute to satisfy that loss, against which they have all insured. To <sup>q</sup> constitute such a re-assurance as the statute just cited prohibits, it must be framed with a view of intitling the party assured in all events to a double satisfaction for the same loss. But it does not appear, that double policies are absolutely void. The effect therefore of the law, where the party insured has any interest in the property protected by the policy, seems to be only to make the satisfaction commensurate to the real loss: which (as I have mentioned) was the footing, on which insurances stood, before wagering policies were introduced; least the temptation of gain should occasion wilful and unfair mismanagement. It is farther to be observed, that <sup>r</sup> if the party insured have no property in the effects, and the policy by reason thereof be void according to the statute, still the underwriter can maintain no action to recover back the premium, which he has paid; the transaction is

<sup>p</sup> Burr. 492.

<sup>q</sup> Ibid.

<sup>r</sup> Dougl. 468. But see Cowp. 792.

against

against law, and neither party is intitled to juridical relief.

I proceed now to insurances, that are void upon other grounds. An <sup>a</sup> insurance, on a voyage prohibited by the laws of this country is absolutely void. So are such policies as are infected with fraud. Thus an <sup>a</sup> agreement between the party insured and the first underwriter, that he shall not be bound by signing the policy, renders it fraudulent and of no effect. So likewise a <sup>u</sup> representation of a material fact, made to the first underwriter, extends to all the others: and if it be <sup>x</sup> grossly false, it contaminates the policy, and renders it void, as to the subsequent insurers. But a <sup>v</sup> representation, made to the insurers by the broker, who negotiates the policy, is distinguishable from a *warranty*, and does not, like the latter, require a literal completion. Insurances <sup>z</sup> are also void, where the party insured or his agent, fraudulently or negligently

<sup>a</sup> Dougl. 254. <sup>1</sup> Durnf. & East 85. & n.

<sup>b</sup> Burr. 1361.

<sup>u</sup> Dougl. 305,

<sup>x</sup> Dougl. 260. Cowp. 789.

<sup>v</sup> Cowp. 785. Dougl. 11. <sup>1</sup> Durnf. & East 345, 6.

<sup>z</sup> Burr. 1477. 1909. <sup>1</sup> Durnf. & East 12 &c.

*conceals*

*conceals* a material fact, which increases the risque. Thus <sup>a</sup> if advice were come, that the ship was leaky and suddenly disappeared, the policy is void, tho the vessel be not wrecked, but taken by an enemy. But tho <sup>b</sup> any accidental risque, as the unexpected detention of a ship in India for an additional year, be not specially alluded to, yet if it be authorised by the usage of the trade, (to which the words of the policy are adapted) it is understood to be one of the perils insured against, and the underwriters are liable. What shall amount to such a concealment as shall vitiate the policy, was very attentively considered in the <sup>c</sup> case of an insurance made against the loss of Fort Marlborough, for the benefit of the governor, "interest or no interest," the above-mentioned statute against gaming policies extending only to ships and merchandise. One question was, whether, on principles of policy, a governor should be allowed to insure a fort under his command. But it appeared, that he was rather a merchant than a military governor, and the place rather a factory than a fort. The concealments, principally objected to, were the weakness of the place,

<sup>a</sup> Str. 1183.<sup>b</sup> Burr. 1712 &c.<sup>c</sup> Burr. 1905 &c.

and the probability of its being attacked, the French having had that intention the year before. The court admitted, that the special facts, upon which any contingent chance is to be computed, lying chiefly in the knowledge of the insured, the suppression of such facts amounts generally to a fraud, and the policy is void. Altho the suppression should happen by mistake without any fraudulent intention, still the underwriter is deceived, and the policy is void; because the risque run is different from what it was understood to be at the time of the agreement. The policy would equally be void against the underwriter, if he concealed; as if he insured a ship, as on her voyage, which he privately knew to be arrived; and an action would lie to recover the premium. But the insured is not bound to mention, what the underwriter ought to know. Thus the difficulty of the voyage, the seasons in other climates, the probability of a rupture with foreign states, and the like, are considered as general topics of speculation, unnecessary to be expressed. In this case the underwriters could well judge of the British force in India, they could contemplate the chance of an attack at Fort Marlborough, and estimate the risque they ran.

ran. They knew, the insurance was for the benefit of the governor, who could not, consistently with his duty, disclose the defenceless condition of the place, where he presided. And as to the intention of the French in the preceding year, as it does not follow, that they persisted in such resolution, it was mere matter of speculation. The determination of the court therefore was in support of the insurance, on these principles and reasoning, which seem of convincing force, and of extensive practical utility.

I have before observed, that insurances may be general, or partial and confined only to particular perils with an exception as to others. Thus<sup>d</sup> a ship was insured with a warranty against captures and seizures, that is, in such event the insurers were not to be called upon. The loss stated in the declaration was, that the vessel sunk at sea. The proof was, that she sailed out of port, and had never since been heard of, an interim of four years having elapsed. The underwriters insisted, that as captures and seizures were excepted, it was incumbent on the plaintiff spe-

<sup>d</sup> Str. 1199, 1200.

cifically to prove, the loss happened in the manner he had set forth in the declaration. But the chief justice thought it would be unreasonable to expect certain evidence in such cases; and the plaintiff had the benefit of his insurance. Perhaps this authority also may be of extensive application.

A considerable part of the doctrine of insurances remains almost untouched, or rather not distinctly alluded to. This respects the question, in what cases the insured shall recover only for an average loss, or partial and particular damage, or may at once seek satisfaction as for a total loss. The<sup>e</sup> reasoning on this subject is very diffusive, depending on the various complications of possible events. It is therefore difficult to collect rules of a general nature. It may however be observed, that<sup>f</sup> when goods are damaged, or part of them perish in the voyage, so that the

<sup>e</sup> See Dougl. 231 &c. 2 Durnf. & East 407 &c. 3 Durnf. & East 362.—Where the declaration claims as for a total loss, an average loss may be recovered, Dougl. 732. n. but not *vice versa*.

<sup>f</sup> Str. 1065.—Salvage properly signifies the recompence paid to persons, who have assisted in saving ships or goods; but it seems here used as synonymous to the value of the things saved.

salvage,

salvage, or the value of what is received, falls short of the freight to be paid, the insured is intitled to demand as for a total loss: and <sup>g</sup> in most cases capture by an enemy gives him the same right, without being driven to seek any benefit from a recapture. But the <sup>h</sup> circumstance of a ship, after her arrival, not being worth repairing, will not have that effect: tho' <sup>i</sup> in this respect the mercantile law of France is said to be otherwise. The <sup>j</sup> insurance is *on the ship, for the voyage*. If either ship or voyage be lost, it gives the insured *a right to abandon*, and to demand as for a total loss. But <sup>k</sup> unless the insured *do elect* to abandon, and also give notice, within a reasonable time, of such election, to the underwriters concerned, the former can only recover an average compensation.

Hitherto scarcely any but naval policies have been noticed. Insurances <sup>l</sup> *of houses from fire*, frequent as they are, have been productive of few controversial points of litiga-

<sup>g</sup> Burr. 683. <sup>i</sup> Wils. 191. Dougl. 231.

<sup>h</sup> 1 Durnf. & East 190, 1. <sup>i</sup> Ibid. 189.

<sup>j</sup> Ibid. 191.

<sup>k</sup> 1 Durnf. & East 608 &c.

<sup>l</sup> See 2 Wils. 363.

tion. In <sup>m</sup> a case of that kind, which happened in chancery, it was asserted as a general position, that it was necessary, the party insured should have an interest or property, at the time of the insuring, and at the time the fire happens.

Insurances <sup>n</sup> *on lives* are certainly a just and prudential safeguard to persons, a considerable part of whose property depends on that contingency. But of late years a practice, highly pernicious as a species of excessive gaming, and open also to many frauds, prevailed, of insuring lives without any interest depending, and defied the discouragement so properly given by the courts. At length it is effectually restrained by a prohibitory <sup>o</sup> act of parliament, which declares such merely gaming insurances on lives, and other events, to be null and void, and provides, that where any interest *is* depending, the insured shall recover only the amount of such interest.

I shall only mention farther in regard to insurances, that <sup>p</sup> tho the policy contains a

<sup>m</sup> 2 Atk. 555.

<sup>n</sup> See Cowp. 788.

<sup>o</sup> St. 14 G. III. c. 48.

<sup>p</sup> 1 Will. 129.

clause

clause for settling disputes by arbitration, yet if no reference be depending, or none have been made and determined, an action may be brought; for the agreement of the parties cannot deraign the jurisdiction of the king's superior courts: and<sup>a</sup> that policies of insurance in general may be transferred, so as to enable the assignee to bring an action in the name of the assignor against the insurer.

It is time to proceed to other instruments, which may found an action of *assumpsit*. This<sup>r</sup> then is the proper remedy on the written or printed articles or conditions of a *public auction or sale*. The declaration usually states mutual promises of the plaintiff and defendant to fulfil the terms and conditions specified; and if they be infringed, either vendor or vendee may in this mode obtain satisfaction.

It is not now very usual to commence this ac-

<sup>a</sup> 1 Durnf. & East 26.

<sup>r</sup> The bidding is only an offer, and not binding on either side, till the goods are, as it is expressed, *knocked down*. (3 Durnf. & East 148, 9.)

tion on any agreement respecting<sup>1</sup> lands: but in some such instances it may be brought, as by a landlord against his tenant, who having by a written memorandum, not under seal, contracted for the lease of an estate, afterwards refuses to execute the indentures, tho he enters upon and occupies the farm. And other similar occasions for using this action may occur between landlord and tenant, where there have been agreements in writing, but not under seal.

To the cases, which I have distinctly enumerated, must be added such promises and undertakings as the<sup>1</sup> statute of frauds absolutely requires to be in writing. For by that act it is provided, “that no action shall be brought, whereby to charge an executor or administrator upon any special promise, to answer damages out of his own estate, or

<sup>1</sup> In 2 Instruct. clerical. 108 &c. 113, 4. (5th ed.) there are precedents of bringing this personal action for damages, for not making a feoffment of a messuage according to promise, for not delivering seisin of land sold, and for not making a good estate of land sold. It is the present course on these occasions to resort to a court of equity; where, (with a few exceptions) a memorandum in writing of the agreement is requisite by the statute of frauds, as would be the case at common law, if such action were now to brought.

<sup>2</sup> 29 C. 11. c. 3.

whereby to charge the defendant upon any special promise, to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." The same law farther ordains, "that no contract for the sale of any goods for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged therewith, or their agents thereunto lawfully authorised." These clauses seem admirably framed to avoid ambiguity, (so far as actions at law are concerned)

cerned) and the " decisions on them are such, in general, as common reason dictates, tho they had wanted the authority or sanction of a legal judgment: of these, some notice will be taken in the next lecture: I shall therefore only at present remark, that \* it is sufficient, if the memorandum or note in writing be given in evidence, it need not be stated as such in the declaration.

*See 5 East 10.*

Having treated of these several written foundations of actions of *assumpsit*, among which policies of insurance, from their complex and diffusive nature, took up most of our attention, I shall in the next lecture speak of other occasions of using the same form of suit, where no writing intervenes, and shall take that opportunity of more fully particularising the nature of the action itself.

\* 1 Vent. 361, 2. 2 Vent. 361. Str. 873.

\* 2 Sal. 519. T. Jon. 158.

## LECTURE XLVII.

*Of actions of assumpsit not founded on any writing.*

**H**AVING in the last lecture considered those actions of *assumpsit*, which are founded on some writing or memorandum, I proceed to such as arise from unwritten promises, and shall afterwards speak of the more usual kinds of defence, that may be made to this suit.

The promise or undertaking, which is the basis of the action, may be positive, express and direct, or implied only and raised by intendment of law, on principles of natural justice. Thus if a man employ another in the way of his profession or occupation, without any mention of reward, law and reason impute to the employer a promise of making a suitable recompence for the business to be done; and he thereby becomes as liable to an action of *assumpsit*, as if he had expressly stipulated for

for the price. But as the *consideration* on which the promise is either made or implied, is always the principal object, it will perhaps be of greater practical utility to pursue and illustrate another distinction, that namely which exists between a special promise or undertaking, and a more general form, called in a barbarous dialect, an *indebitatus assumpsit*; both of which are unavailable without a good consideration. I shall keep this latter distinction chiefly in view, incidentally however, under the class of special *assumpsits*, referring to promises raised by implication.

I. A special *assumpsit* may be brought on any positive or implied promise, executory and unperformed, lawful in itself, and founded on a good *consideration*. A *consideration* is here technically used, and <sup>a</sup> signifies a cause or occasion meritorious, requiring a mutual recompence; and it is constantly recited in the declaration as the ground of the undertaking. Without such support, any promise or engagement is termed *nudum pactum*, and treated as of no avail. Thus <sup>b</sup> if a man pro-

<sup>a</sup> Dy. 336. b.

<sup>b</sup> 1 R. A. 9.

mise to build a mill or a house for another, or the like, he cannot be sued, without alleging a consideration. So<sup>c</sup> also a promise made in consideration of friendship or affection, or of many benefits conferred, is insufficient in law to maintain this action; for those are vague and general grounds.

The<sup>d</sup> consideration ought to be some certain act, matter or thing, by which the defendant may have benefit or satisfaction, or the plaintiff incur some trouble or hindrance; either a damage to the plaintiff, or an advantage to the defendant. It may be something executed and performed, or of present continuance, or to be accomplished in future.

1. Thus an act already past, as having become bail for another, and paid the debt, may be a sufficient consideration to ground an *assumpsit*, if it appear to be done at the defendant's<sup>e</sup> request: but if it be merely spontaneous, the contrary rule prevails; for then

<sup>c</sup> 2 Leon. 30. 1 Vent. 27. Dougl. 728.

<sup>d</sup> See 2 Bul. 269. 3 Lev. 366. 1 Cro. 63, 64. T. Ray.  
31. 1 Sid. 57. Cowp. 289. 3 Durnf. & East 654.

<sup>e</sup> Hob. 106, 2 Leon. 224, 5. 3 Lev. 366.

the ensuing promise is considered as spontaneous too, and will not in general warrant an action.

There is however a distinct set of cases, where the consideration also relates to time past, and where it is not necessary to allege any thing to have been done at the defendant's request. In such instances, the claim is founded, not simply, or not at all, on the private contract or dealing of the parties, but on some customary or prescriptive right, or some general principle of legal or moral obligation. Thus this action lies (and even in a general form, like that of the still more common *indebitatus assumpsit*) for many <sup>f</sup> duties and *tolls* claimed by corporations and others; because what a man is *liable* to pay, the law imputes to him a promise to discharge. In these cases, the validity of the custom, and the defendant's having brought himself into a condition of being subject to it, jointly form a sufficient antecedent consideration to found a presumptive promise. On the same principles, a <sup>g</sup> general *indebitatus assumpsit* will lie for the lord of the manor to recover a fine

<sup>f</sup> 1 Durnf. & East 616 &c.

<sup>g</sup> 3 Lev. 261, 2. Dougl. 729.

due and assessed according to the custom on an admittance to a copyhold tenement within his seignory. An <sup>h</sup> action of *assumpsit* is also maintainable, where the demand arises by virtue of a public or private act of parliament. An <sup>i</sup> *indebitatus assumpsit* may likewise be brought on the judgment of a foreign court, without stating the original cause of suit; and this may be considered as another case of *legal* obligation. But <sup>k</sup> where the obligation is of the *moral* or equitable kind, and destitute of legal force, this indeed is a sufficient meritorious consideration, but then there must be a positive and express promise: as if a man promise, after he comes of age, to discharge a just demand, contracted during his minority, tho not for necessities; or if a certificated bankrupt, in affluent circumstances, promise to pay the remainder of a debt. So <sup>l</sup> if an executor have received assets, this forms a good consideration, rendering him liable to pay a legacy: but whether an express promise of payment is in such case requisite, seems not explicitly decided; tho <sup>m</sup> it was

<sup>h</sup> Cowp. 474. Dougl. 10. n. 402, 3. See Dougl. 407.  
722 &c. 727. n. <sup>i</sup> Dougl. 4, 5. n.

<sup>k</sup> Cowp. 290. 2 Durnf. & East 765, 6.

<sup>l</sup> Cowp. 284—294. <sup>m</sup> Cowp. 290.

said,

said, that he *ought to assent*, if he have assets, and that he has no discretion or election; which perhaps amounts to the same thing.

2. The consideration may be of present duration or continuance. This seems to be the chief reason, relied on by the court, that the promise <sup>n</sup> was adjudged good, where a landlord, in consideration that his tenant had paid a certain rent, undertook to save him harmless against all persons as to his occupation of the farm during the term. For as the tenant was to remain in possession, the regular payment of the rent, as it should become due, was a continuing consideration. Thus if <sup>a</sup> a father, whose son, having been sick, has been cured by a physician, tho' unsent for, undertake to make a recompence for such medical advice, the promise is valid; for it is supported by natural love and affection, joined to the recovery of the patient; this therefore and <sup>p</sup> similar instances have been treated, and justly, as founded on considerations of present duration.

<sup>n</sup> 1 Leon. 102. 1 Cro. 94.

<sup>a</sup> 2 Leon. 111.

<sup>p</sup> Palm. 559—562.

3. Lastly,

3. Lastly, the consideration may be something to be accomplished in future ; which is the most common ground of *special assumpsits*. The declaration, for example, may state, that <sup>a</sup> in consideration the plaintiff would deliver to the defendant an indenture to peruse, the defendant promised to re-deliver it by a time prefixed, or to pay a certain sum, when he should be afterwards required. In such cases the completion of the consideration, namely, in this instance, the delivery of the indenture by the plaintiff, is posterior to the promise. The declaration therefore ought to aver, that the plaintiff has on his part fulfilled the terms, on which the promise was made, where the nature of the case will admit of it, or otherwise he must state at least a readiness of compliance, with and sometimes without an initiate performance. Of this nature are agreements to employ others in our affairs for a certain or a reasonable reward, as brokers, agents, and all others, to whom goods are for any special purpose intrusted. If such persons neglect or abuse their commission, they may be sued for damages in this action, on the implied *assumpsit* of acting as their oc-

<sup>a</sup> 1 Leon. 297.

cupation and good faith require. Here the consideration is in part performed by thus employing the defendant; but as to the residue, the plaintiff can only profess his willingness of paying the reward, in case the other had done his duty. And it must be observed, that a *gratuitous* undertaking of a trust may oblige the party to careful management: as where the defendant without any stipulation or intention of reward had engaged to convey the plaintiff's brandy from one cellar to another, and by his negligence one of the casks was staved, he was adjudged answerable for the damage in this action. Sometimes on the other hand there is no initiate performance of the consideration. Thus where *mutual promises* are set forth, the plaintiff need only allege an offer or willingness to execute his part of the undertaking. Such is the form in an action for breach of a promise of a marriage. Mutual promises are also alleged in suits brought on many executory agreements, and in wagering transactions. This introduced the custom of trying any question, intended to be ascertained by a verdict, in this form, a wager being supposed, that is, reci-

\* Lord Raym. 909 &c.

\* T. Raym. 32.

procal promises to pay a certain sum by one or other of the parties according as the event should appear, and the defendant acknowledging in his plea, that he made such undertaking, but insisting, that he was right in the fact, on which issue is thereupon joined. Such actions are called feigned issues, or issues out of chancery, when directed by that court to be so tried.

The foregoing observations may assist in pointing out the cases, where a special *assumpsit* is the proper means of juridical redress. I must here add, that 'if the promise stand merely on the agreement of the parties, not being implied by the law, nor the result of some custom, or the like, a *request* to fulfil it must be alleged in the declaration *specially*, that is, with mention of time and place; for it is a material fact; and opportunity must be given to traverse and try it; and therefore there must be denoted a place of trial. Thus" a man may sue for breach of a promise of marriage, as well as a woman; but *he* must allege an *offer* to fulfil the contract.

\* Lut. 231. W. Jon. 56.

" Carth. 467, 8.

The principal objections or exceptions, that may be taken to this action, seem here to exact some attention.

If the consideration be void, impossible, or illegal, the promise is also of no effect. Thus a <sup>x</sup> promise to pay twenty pounds, in consideration the plaintiff would not give his evidence in a preceding cause, will not sustain an action; for it is unlawful and iniquitous so to suppress testimony. If divers <sup>y</sup> considerations be alleged, and some of them be frivolous and void, or insufficient in matter or form, yet if any of them be good, the plaintiff may recover. For the damages shall be supposed given for breach of the promise, so far as it is grounded on the good consideration; and <sup>z</sup> that, which is void, need not be proved; for it is as if it had not been alleged. Yet ~~it~~ is said <sup>a</sup>, that if the jury *find* one of the considerations *false*, the action fails. But if one of the considerations be, not simply frivo-

<sup>x</sup> 1 Leon. 180. 3 Durnf. & East 17 &c.

<sup>y</sup> 1 Cro. 149, 848. 1 Sid. 38.

<sup>z</sup> 2 Cro. 127, 8; tho 4 Leon. 3. cont; but see Dougl. 668, 9.

<sup>a</sup> 1 Cro. 848.

lous or void, but <sup>b</sup> illegal or immoral, this completely vitiates the promise. So, whatever be the consideration, if the <sup>c</sup> undertaking be to do an unlawful thing, it is void; as to give money for a presentation to a donative, for it is simony. A <sup>d</sup> general restraint on trade is illegal, but a partial one allowed. A promise therefore not to set up a certain trade at all, tho made on a good consideration, is void. If on the other hand the restraint be confined to a particular town or the like, it may be valid. But <sup>e</sup> if *part* of a promise, or one of the things undertaken, be illegal, it vitiates the whole. Lastly <sup>f</sup>, both parties must be absolutely bound by the terms of the contract, or both at liberty to recede.

In the last lecture we saw the necessity, in some cases, of a memorandum in writing, according to the requisition of the <sup>g</sup> statute of frauds. It may be proper here to notice (among the objections to actions of *assumpsit*) some constructions, that have been judicially

<sup>b</sup> 1 Cro. 199, 200. 2 Will. 133, 4. Burr. 924 &c.

<sup>c</sup> 1 R. A. 18. 3 Cro. 337, 8. 353, 4. 361.

<sup>d</sup> 1 Wms. 181. Str. 739. 3 Br. parl. ca. 349.

<sup>e</sup> T. Jon. 84. <sup>f</sup> 3 Durnf. & East 653, 4.

<sup>g</sup> 29 C. II. c. 3.

*technical*

made upon that law. As to the clause then respecting sales, an <sup>h</sup> auctioneer, after goods are (in the ~~familiar~~ phrase) *knocked down* at a certain price, is to be considered as an agent for the buyer as well as the seller; and consequently the entry in his books is sufficient to satisfy the relative provision of the act. It has<sup>i</sup> also been ruled, that this clause means present and immediate sales, and does not include executory contracts, where goods are bespoke, and time is given by special agreement, for the delivery of them, and payment of their value. Another clause of the statute relates to agreements not to be performed within a year. But contingencies are not thereby affected. A <sup>k</sup> promise to marry at the plaintiff's father's death, or <sup>l</sup> to leave to any person a legacy for a good consideration, are valid. For the statute means agreements expressly and specifically stipulated to be performed at a more distant period than the space of a year. Lastly, as to the provisions, which relate to undertaking for the debt of another, the <sup>m</sup> distinction is, that an *original* promise is out of the statute, a *collateral* promise is within its

<sup>h</sup> Burr. 1921, 2.<sup>i</sup> Str. 506.<sup>k</sup> Str. 34.<sup>l</sup> Burr. 1278.<sup>m</sup> 1 Will. 306. Lord Raym. 1085.

operation.

operation. An original promise is where the promiser makes himself liable to be resorted to and sued as an original debtor; as if one say to a tradesman, "send goods to J. S, and I will pay you;" such promiser, and not J. S, is the person subject to an action; this case therefore is not within the statute, and the undertaking need not be in writing. But if a man come with another to a shop, and the shopkeeper say, "I will not sell *him* the goods, unless you will undertake, he shall pay me for them," and the other promise accordingly; or "if a man order goods to be sent to J. S, and say, "*if he do not pay you*, I will;" these and similar promises are collateral, and required by the statute to be in writing: || which seems to be generally the case where the person, for whose use goods are delivered, is liable at all as a debtor for them; and it makes no difference, whether the promise be before or after the delivery of the goods.

It must also farther be remembered, that this is a mere personal action. It lies for and against personal representatives, but not for an heir on a promise to his ancestor. We

<sup>1</sup> Cowp. 227. Fitzgib. 303. 2 Durnf. & East 80, 81.

have before seen, that it cannot be brought on ° any writing under seal; therefore, for example, not on an indenture of lease for the rent thereby reserved. Neither, as it was antiently<sup>p</sup> said, will the law imply any promise to pay the rent on a parol lease; for (in the technical phrase) the demand favors of the realty, and there are other remedies, by action of debt, (tho that too is a personal suit) and by distress. But<sup>q</sup> if there be in fact a collateral and express promise to pay the rent, and no deed executed under seal, it may be recovered in this mode; because it appears, that the promiser intended to give the plaintiff this additional remedy. This<sup>r</sup> action is also maintainable to obtain a recompence for the occupation of the plaintiff's land by his permission, where there is no stipulation for any precise rent. The declaration states a promise of the defendant to pay so much as the landlord reasonably deserved to have (*quantum meruit*) for such permission: which promise may be implied by the law. For

° Nor yet on either an implied or actual promise, where the plaintiff, not satisfied therewith, or not choosing to rely thereon, has taken a bond as a security for his demand, on which he ought to proceed. (2 Durnf. & East 104.)

<sup>p</sup> 1 R. A. 7. l. 23. 28.

<sup>q</sup> 3 Lev. 150.

<sup>r</sup> 3 Mod. 73. Skin. 238. 242.

there

there being no certain rent, the plaintiff could neither distrain, nor properly perhaps bring an action of debt; this seems the plaintiff's genuine remedy: if therefore it may be allowed at all, the promise may well be implied; and tho a precise rent was agreed for, (and consequently there was an actual promise of payment, which however the plaintiff has not evidence to prove) yet in this way he may recover satisfaction. Scarce any thing is more usual than such action of *assumpsit* for the use and occupation of the plaintiff's house by his permission, which also being real estate, the same objection, if any, might in that case be alleged against implying a promise of making adequate compensation. I have entered thus fully into the subject, as a matter of general utility, unaided by any solemn decision in point. But I understand the prevailing practice to be, to bring *assumpsit* for land, occupied by the plaintiff's permission, without any scruple or objection founded on the old books to the contrary.

In the last, as well as some former instances, the succinct form of an *indebitatus assumpsit* may be pursued: but the connection of the general doctrine led to the mention of those

those cases. Before we quit the immediate view of special *assumpsits*, there is 'this distinction to be attended to, that if the particular contract continue open and undetermined, it must be stated in the declaration, and the plaintiff can only recover damages in so much as it has been infringed; but if such contract be rescinded by mutual consent, or otherwise at an end, and money have been paid under it, the sum so paid may be recovered under the summary form of money had and received to the plaintiff's use; that is, provided there was nothing illegal in the contract; for 'the court will not assist the recovery back of money paid on an illicit transaction. It may also be proper to exemplify, on the present occasion, the advantage of several counts in the declaration. If then, for instance, the cause of action be an engagement to take the plaintiff as chief mate of a certain ship during a destined voyage, he may set forth a promise to pay him the wages contracted for, and to allow him the usual perquisites and advantages in trade of persons in that capacity. His right to such emoluments may depend chiefly upon usage, or for some reason

<sup>a</sup> 1 Durnf. & East 136.

<sup>t</sup> Dougl. 468 &c. 3 Durnf. & East 266, 7.

may not be easily established, so<sup>u</sup> that he cannot prove any certain profit, which he might have so gained. A verdict therefore may be taken on the second count, in which the wages only are mentioned. Thus the declaration, so framed, may give him an opportunity of proving all that he can, and of securing the benefit of what he actually proves. And it must be farther observed, that<sup>x</sup> when a plaintiff fails of proving the case stated in a special count, after an attempt for that purpose, it is now the course to permit him to go into evidence even on the general counts, (of which I am next to speak) if<sup>y</sup> the plaintiff have given notice that he means to rely on them, as well as on the other special ground; the necessity of which notice is in order to prevent a surprise on the defendant.

II. In the general counts the succinct form of an *indebitatus assumpsit* obtains, the declaration briefly stating, that whereas the defend-

<sup>u</sup> Or perhaps he may not be able to prove, that an allowance of these emoluments made a part of the contract; as it seems he ought to do; for a contract being intire in its nature, must be proved as laid; tho a plaintiff is not bound to strict proof of all the averments in his declaration, containing, for instance, matter subsequent to the contract, and by way of inducement to the action. (3 Durnf. & East 646.)

<sup>x</sup> Dougl. 651.

<sup>y</sup> 1 Durnf. & East 134.

ant was *indebted* to the plaintiff by virtue of the cause therein mentioned, in *consideration* thereof he promised payment. The three most common counts, framed in this way, are for money *had and received* by the defendant for the plaintiff's use, money *lent and advanced* to the defendant, and money *paid, laid out, and expended* for his use; which <sup>2</sup> two latter transactions must have been at his *instance and request*. The same concise form is pursued for the *price or worth of goods sold and delivered*, and for *work and labour performed* for the defendant, either generally, or in some profession or trade, with a charge occasionally of materials found as well as workmanship. It <sup>3</sup> has been adjudged maintainable for the penalty forfeited by a by-law; (but debt is there a more proper action;) it <sup>b</sup> lies also by a personal representative for the arrears due on a composition for small tithes; (and I apprehend for the rector or vicar during the incumbency;) it may be brought, as before observed, for the use and occupation of a

<sup>2</sup> See 1 Durnf. & East 21. <sup>3</sup> Durnf. & East 423.

<sup>a</sup> 2 Lev. 252.

<sup>b</sup> So for other ecclesiastical dues, as the profits of a donative before, and of a perpetual curacy after, licence by the bishop. (1 Durnf. & East 403, 4.)

house, or of furniture or the like, by the plaintiff's permission; for the freight of goods; by<sup>c</sup> one partner in trade against another for money received to the separate account of the former, and unduly carried to the partnership account; and in such other familiar instances, where the demand accrues more from reason and the known commerce of the world than any special and positive contract or agreement. The single count, in particular, for "*money had and received*" has been so liberally extended in its application, that<sup>d</sup> where the defendant has received money, which *ex æquo et bono* ought to be deemed as belonging to the plaintiff, this brief formulary may be adopted, without stating the special circumstances on record, which are to be given in evidence at the trial. For<sup>e</sup> neither party on this occasion can avail himself of defects of form. And<sup>f</sup> this mode is equally beneficial to the defendant, and the most favorable way, in which he can be sued: he can be liable no farther than to the amount of his actual receipts, and against them he may go into every just defence, upon the ge-

<sup>c</sup> 2 Durnf. & East 476 &c.<sup>d</sup> Burr. 1010.<sup>e</sup> Cowp. 807.<sup>f</sup> Burr. 1010. 2133, 4.

neral issue, without setting it forth on record in a special plea; which might be attended with expence, hazard and inconvenience; thus he may prove even a release without pleading it; he may claim every equitable allowance; he may protect himself by every thing, which shews, that the plaintiff *ex æquo et bono* is not intitled to the whole, or to any particular quantum, of his demand. This<sup>s</sup> common count for money had and received is available where any sum has been paid by mistake, and which there was no ground in conscience to claim, or upon a consideration, which happens wholly to fail, or has been got through imposition, extortion, or oppression; or wherever the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money. For in all these instances, the law implies a promise of making such restitution of the money really due. But where the plaintiff has paid a demand, which the positive laws of the country did not indeed oblige him to discharge, which however the defendant may with a safe conscience retain, (as a debt which

<sup>s</sup> Burr. 1012. 1 Durnf. & East 134. 286, 7. 387. 2 Durnf. & East 370.

might otherwise have been barred by the<sup>h</sup> statute of limitations) this action lies not to have such money refunded. Neither<sup>i</sup> is it maintainable (<sup>k</sup> for it has been compared to a bill in equity) in order to recover any unreasonable and exorbitant demand.—The three common counts, and also sometimes a fourth, (stating that the plaintiff *accounted* with the defendant, and the latter being found in arrear to a particular<sup>l</sup> amount, promised to pay it) are frequently subjoined in the same declaration, where a special agreement is previously stated; that if either the matter or the proof of the circumstantial narrative be defective, the plaintiff may still have an opportunity of success.

What remains to be said respects actions of *assumpsit* indiscriminately. The general issue is that the defendant (*non assumpsit*) did not promise and undertake in the manner alleged. The particular kinds of defence, and how far they

<sup>h</sup> 21 J. I. c. 16.

<sup>i</sup> Cowp. 793.

<sup>k</sup> 2 Durnf. & East 370.

<sup>l</sup> Which is here usually specified with more exactness in the declaration than in the more common counts; but the precise sum need not be proved. (Bull. nisi prius 127. See Dougl. 665 &c. 3 Durnf. & East 643 &c.)

are necessary to be set forth in a special plea, may in some measure be collected from what has already been observed. If the <sup>m</sup> statute of limitations be intended to be relied upon; the defendant must plead, that he did not undertake within six years, for <sup>n</sup> he cannot take advantage of this lapse of time upon the general issue. But <sup>o</sup> if a promise be made ten years before to do a thing upon request, and the request be made within the limited time, the statute is no bar. And if <sup>p</sup> a defendant within six years make a new, and even a conditional, promise, as by saying, "prove the debt, and I will pay you," which condition is effected, or if he acknowledge the justice of the demand, either of these occurrences revives and maintains the right of action. The statute also itself provides, that the plaintiff shall not be obliged to sue within the six years, if he or she have labored under the disabilities of infancy, coverture, insanity, or imprisonment, or resided beyond the seas. Any therefore of these incapacities (except indeed insanity, <sup>q</sup> for a man is not allowed, as it

<sup>m</sup> 21 J. I. c. 16.<sup>n</sup> 1 Lev. 110, 1.<sup>o</sup> 1 Lev. 48.<sup>p</sup> 1 Sal. 29. 5 Mod. 425, 6. Carth. 470, 1. See 2 Durnf. & East 760 &c.<sup>q</sup> See 2 Black. comm. 291, 2; where the reasonableness of this

it is expressed, to stultify himself) may be alleged in the replication as an answer to the beforementioned plea. But<sup>r</sup> the judges would not construe the equity of the statute to extend to cases where the *defendant* had resided abroad, till a new<sup>r</sup> statute expressly ordained, that in such case it should be sufficient to sue within the limited time after his return.

To this action of *assumpsit* may also be pleaded a judgment heretofore recovered for the same demand. For the plaintiff must by law<sup>r</sup> proceed on such judgment, and not harass the defendant with the costs of two actions on the *same original ground*. This defence is too frequently abused for a *sham plea*, as it is called, that is, without any foundation in truth, and intended only for delay.

this established rule of law seems intended to be impeached.

<sup>r</sup> 2 Sal. 420. Carth. 136, 7. 1 Sho. 98, 99.

<sup>s</sup> 4 A. c. 16. § 19.

<sup>t</sup> He may either sue out execution on such judgment, or ground a new action on *that* solid ground. But if he bring a new action, pending a writ of error, on the former judgment, and obtain a second judgment, he will not be allowed to take out execution thereon, according to the *a fortiori* reasoning of the court, as on a new point. (3 Durnf. & East 643.)

Another plea in bar is that the defendant was an infant within the age of twenty-one years at the time of making the supposed promises in the declaration: to which it may be "replied, that the cause of action was for necessities provided for the defendant, as for instance clothing and apparel suitable to his degree; or that the defendant ratified the undertaking after his age of majority. Indeed it is said <sup>x</sup>, that non-age is not necessary to be pleaded; but may be taken advantage of in this action under the general issue, because it shews, that there was no valid contract at the commencement, which goes to the gift of the action; tho it seems more fair and candid to give notice on record of such defence, and not to surprise the plaintiff with an unexpected head of evidence.

It is usual also to plead or give notice of a *set-off*, that is a mutual debt or cross demand by the defendant, with the manner, in

<sup>y</sup> See Vol. I. 402 & n. and the authorities there cited.

<sup>x</sup> Gilb. C. P. 65. <sup>y</sup> St. 2 G. II. c. 22. § 13 8 G. II. c. 24. § 4, both commented on 3 Durnf. & East 65 &c. and see 2 Durnf. & East 478. In cases of bankruptcy, a cross demand, in diminution of the claim of the assignees, may be proved under the general issue without notice. (1 Durnf. & East 115, 6.)

which it arose. And <sup>z</sup> it must be alleged as due at the commencement of the action, not at the time of the plea pleaded merely. In such case the parties are alternately plaintiff and defendant. And <sup>a</sup> if the cross demand or part of it be of earlier date than the six years last past, that objection may be replied to it, in like manner as the same may be pleaded in bar to the declaration.

Another course, very frequently taken by the defendant in *assumpsit*, is <sup>b</sup> to plead a *tender*, or that he, at a time and place particularly alleged, “ offered the plaintiff <sup>c</sup> a certain sum, which he always hath been and still is ready to pay, and brings into court.” This may be pleaded by leave of the court after the general issue, or as one plea setting forth, “ that the defendant did not undertake” (meaning that the plaintiff has no just demand, no right of action) except as to the sum tendered. It <sup>d</sup> appears therefore to go

<sup>z</sup> 3 Durnf. & East 186 &c.

<sup>a</sup> Str. 1271.

<sup>b</sup> See 3 Durnf. & East 683 &c.

<sup>c</sup> It has not been yet determined, that a tender *in bank notes* is at all events a good tender; but it is certainly available, unless objected to at the time. (3 Durnf. & East 554.)

<sup>d</sup> See Carth. 133.

in bar of the damages, not of the action. For the plaintiff is <sup>e</sup> intitled to take the money out of court; and if he thinks it inadequate to his demand, may proceed to the trial of any issue, that is or may be joined in the cause. If no more be proved to be due than the sum so tendered, the defendant will have a verdict. Otherwise the plaintiff will take a verdict for the money due, deducting what has been tendered; because that he may take out of court, without including it in the judgment. It must be noted, that money thus paid into court amounts to an admission or acknowledgment of debt; and <sup>f</sup> the defendant cannot afterwards plead that he did not undertake within six years, under the protection of the <sup>g</sup> statute of limitations.

Altho actions of *assumpsit* are considered as arising *ex contractu*, and not *ex delicto*, that distinction respects only the *origin* of the cause of suit; which (as we have seen) is some promise positive or implied. But it does not follow, that the defendant is free from the legal imputation of blame. His <sup>h</sup> subsequent

<sup>e</sup> See Lord Raym. 774, 5.

<sup>f</sup> Bunb. 100.

<sup>g</sup> 21 J. I. c. 16.

<sup>h</sup> Gilb. C. P. 65.

breach

breach of promise may be looked upon as fraudulent and injurious: and an *assumpsit* is legally stiled an action of *trespass* on the case upon promises. Formerly<sup>i</sup> therefore the plea of “not guilty” was used as the general issue: and<sup>k</sup> it is still effectual, that is, the objection comes too late, after a verdict. These are the reasons, that in this action the defendant is not allowed to wage his law; which<sup>l</sup> is never admitted, where any trespass, deceit, or injury is alleged in the declaration.

The observations, that have been made, and the cases that have been instanced, may suffice in some measure to explain the nature of this very common and equitable action.

I shall here subjoin, that if an executor or administrator be sued in this mode, and there are debts of a superior nature, as by bond or judgment, remaining unsatisfied, they<sup>m</sup> ought to be pleaded as having a priority. For other-

<sup>i</sup> 1 Lev. 142.

<sup>k</sup> Rep. B. R. temp. Hardw. 173, 4.

<sup>l</sup> 1 Inst. 295. a.

<sup>m</sup> 3 Lev. 113, 4, 5.—I have before (Vol. II. 417, 8 & n.) in some measure noticed the order, in which a personal representative ought to pay the debts of his testator or intestate. The subject is attentively considered in 4 Burn eccl. law 252 &c. (ed. 1767).

wife a general judgment may be obtained against such personal representative in this action; and he may afterwards be liable, if the assets of the testator or intestate prove deficient, to discharge a specialty creditor out of his own effects. And it may be proper also to note, that if a debtor appoint his creditor one of the executors named in the will, which such creditor does not prove, nor act as executor, his legal remedy is not extinguished, but he may sue the acting representative of the testator. This rule of law, of general importance, was only cleared from doubt by <sup>n</sup> a late very equitable adjudication.

Having now finished our inquiries concerning such personal actions as arise *ex contractu*, I shall next consider such as proceed *ex delicto*, and are not supposed to be accompanied with force. These are called “special actions on the case,” and will be the subjects of the two following lectures.

<sup>n</sup> 3 Durnf. & East 557 &c.

## LECTURE XLVIII.

*Of actions upon the case, and first of those brought for injuries affecting the plaintiff's person, namely his reputation, safety, and health, and of other nusesances.*

WE are now to consider personal actions arising *ex delicto*, simply from tort or wrong, where no breach of any contract is suggested, and no forcible violence imputed to the defendant. This negative description is the only one, that can easily be given of what are denominated *actions of trespass on the case*. It would, I believe, be impossible to recount all the occasions of bringing these anomalous suits. Every civil right, affecting our persons or our property, may be attacked by injustice, and that injustice may again be multifariously diversified in acts of open malice or secret fraud.

The praise of devising and ordaining a general remedy, to be applied to cases not spe-

cially provided for, is due to a very early parliament. The <sup>a</sup> statute, in the uncouth Latin of the times, has the following expressions: “*quotiescunque de cetero evenerit in cancellaria quod in uno casu reperitur breve, et in consimili casu cadente sub eodem jure et simili indigente remedio concordent clerici de cancellaria in brevi faciendo, vel atterminent querentes in proximo parlamento, et scribant casus in quibus concordare non possunt, et referant eos ad proximum parliamentum, et de consensu jurisperitorum fiat breve, ne contingat decetero, quod curia diu deficiat querentibus in justitiâ perquirendâ.*” To this ordinance the frequency of actions upon the case may be referred. Indeed before the passing of this law, they are spoken of by Bracton, <sup>b</sup> the writs, on which they are founded, being there called *magistralia*, occasionally devised by the masters or clerks in chancery, in opposition to the *brevia formata*, for which there was an established form.—We have before seen, that the more legal denomination of an action of *assumpsit* is that of *trespass upon the case upon promises*. The <sup>c</sup> encouragement

<sup>a</sup> Westm. 2. 13 E. I. c. 24. § 2.

<sup>b</sup> L. v. c. 17. 413. b.

<sup>c</sup> The determination, which is supposed chiefly to have multiplied actions of *assumpsit*, is Slade's case 4 Cq. 91. a.—95. b.—  
The

ment therefore given to that mode of suing also, especially where the promise is raised

The plaintiff sold his crop of wheat and rye growing at a denominated price to the defendant, sued in this form, and obtained a verdict. It was objected, 1. that debt, and not *assumpsit*, was the proper remedy; 2. that by the plaintiff's bringing the latter, the defendant was unjustly deprived of the benefit of waging his law. But the court decided in favor of the action, in conformity to a long series of precedents, and for this solid reason, that "every executory contract imports a promise to fulfil it." This, I think, in effect, had been adjudged long before, tho indeed in that case debt would not have lain, and tho the court doubted on another point, viz. whether the damages would include the time to come. (4 Co. 94. b. Dy. 113. a.) As to depriving the defendant of waging his law, it was thought, the practice merited discouragement, as a temptation to perjury. It is surprising, that Slade's case should have taken so much deliberation, and still more, that it should have been so disrespectfully treated as in *Vau. 121*; where the impropriety is urged, of turning one species of action, founded solely on contract, as debt, into a different species, as *assumpsit*, which suggests a wrongful and fraudulent breach of promise. What great difference is there as to the imputation of blame, between unjustly detaining (as it is constantly expressed) a lawful debt, and breaking a lawful promise? Certain it is, the converse proposition was always clear law, viz. that a demandant, for example, intitled to sue an assize, which is *querela*, and imputes *tort* to the tenant, might have waived his possessory remedy, and immediately resorted to his writ of right: (Booth 1. 94.) and in Bracton's time a plaintiff had sometimes his choice of various writs on the same occasion. (Bract. l. v. c. 17. 413. b.) But strange as it is, there seems to be an error in giving judgment in Slade's case in one respect, viz. where it is said that for actions of *assumpsit*, there was a settled form in the register. (4 Co. 94. b.) I have found no such thing in that venerable repository. On the contrary it appears, that the count in an action upon promises, even in Henry the sixth's time, varied very much from the present form, and that in his grandfather's reign the suit was much discountenanced. (F. N. B. 213. Hal. ad. loc.)

by

by equitable implication only, may partly depend on this same statute. But this equitable remedy was slowly and reluctantly introduced into our juridical system.

Of the injuries, that may be prosecuted in an action on the case, I shall first consider those, that affect the persons of men, among which are the more atrocious species of wrongs, and shall then advert to those, that invade their property. Under this distinction, by enumerating some, I shall endeavor to point out the nature of all the wrongs, for which a satisfaction in damages may thus be sought.

The law cannot always prevent attacks on the *reputation, safety, health, and quiet* of those under its protection; but in this mode it seeks to procure a compensation to the party aggrieved. These then are the kinds of actionable injuries intended chiefly to be spoken of in the remainder of this discourse.

There are few rights, of which men are more jealous than that of reputation; and few injuries more pernicious in public and private consequences than false and malicious scandal.

This

This action on the case is the remedy for defamation, whether by words spoken, or <sup>d</sup> *libels* uttered. But to prevent the perjury of witnesses and a multiplicity of frivolous suits, it is laid under two very just restraints by the same <sup>e</sup> statute. For first an action for slanderous words must be commenced within two years next after the words spoken; and secondly, if the damages recovered be under forty shillings, the plaintiff is intitled to no

<sup>d</sup> Sir William Blackstone mentions (4 Black. comm. 151.) that by the law of the twelve tables at Rome, libels were made a capital offence: adding, that before the reign of Augustus, the punishment became corporal only: for which he cites, Hor. ad Aug.

*Quinetiam lex*

*Pœnaque lata, malo quæ nollet carmine quenquam  
Describi; vertère modum formidine fustis.*

But this passage is so far from denoting any mitigation of punishment, that it plainly alludes to that very decemviral law, which inflicts the capital sentence: tab. vii. "*si qui pipulocentafit carmenve condifit, quod infamiam faxit flagitiumve alteri, fuste ferito.*" — "*Fuste autem ferire est ad necem cedere.*" (Gravin. de j. n. g. et xii. tab. § 55.) It is remarkable, that Cicero, contrary to his general humanity, mentions the sanguinary law of the twelve tables with applause, giving a very just reason, why libellers should be punished, but which, I think, does not extend to vindicate their punishment with death:—*præclare: judiciis enim ac magistratuum disceptationibus legitimis propositam vitam, non poetarum ingeniis habere debemus, nec probrum audire, nisi eâ lege, ut respondere liceat, et judicio defendere.* (Cic. de rep. l. iv. fragment.)

<sup>e</sup> 21 J. I. c. 16.

more costs than the damages so assessed amount unto. But it has been<sup>f</sup> adjudged, that neither of these clauses extend to cases, where special damage in consequence of the slander published, is stated in the declaration and proved at the trial.

The Roman civil law allowed a shorter period, within which an action of slander must have been commenced, “*Si<sup>g</sup> autem in rixam inconsulto calore prolapsus, homicidii convicium objecisti, et ex eo die annus excessit, cum injuriarum actio annuo tempore præscripta sit, ob injuriæ admissum conveniri non potes.*” “*Injuriarum<sup>h</sup> actio ex æquo et bono est, et dissimulatione aboletur,*”

Besides the checks in the statute above referred to, it must be observed, that every opprobrious expression, tho highly contumelious, is not, by our law, sufficient to maintain an action. What words shall be deemed actionable has been a frequent topic of discussion in our courts. The cases are very numerous,

<sup>f</sup> Bull. nisi prius 11.

<sup>g</sup> Cod. le. ix. t. 35. l. 5.

<sup>h</sup> Dig. l. xlvii. t. 10. l. 11. § 1.

sometimes

sometimes irreconcilable, and often decided on very unsatisfactory reasoning.

Ambiguous words may be very scandalous or very innocent according to different interpretations. In these cases the old rule was, that such equivocal expressions should be taken *in mitiori sensu*. This absurdity<sup>1</sup> has been long exploded; and they are now to be construed neither rigidly nor mildly, but according to their genuine import, and the common understanding of those who hear them.

The words, that are most universally actionable, are such as charge men with felony, perjury, and many other, if not all, <sup>\*</sup> indictable offences, and such as malign them with having (not merely with having had) an infectious disease.

1. But here the first distinction, which I shall make, is, that <sup>1</sup> such calumny and slander, as a private person could not sue for, if it be

<sup>1</sup> Bull. nisi prius 4. 1 Freem. 222. & 2 Mod. 159: per Scroggs J. (who may be here named much to his honour) B. R. Hardw. 339. Fitzgib. 254.

<sup>\*</sup> 2 Lev. 233. Al. 11. 2 Durnf. & East 475. <sup>1</sup> 1 Freem. 49.

spoken

spoken of a lord of parliament, or great officer of the realm, is actionable by the statute 2 R. II. ft. 1. c. 5, and the defendant is liable to imprisonment, on obvious grounds of public policy. By this act, and a more<sup>m</sup> ancient one, to which it refers, the imprisonment was to last till the defendant found or brought into court the first inventor of the scandal. By the statute 12 R. II. c. 11, the punishment was to be by advice of the council. The imprisonment, I apprehend, is now discretionary in the court, as to its duration, and such sentence seems not a necessary part of the judgment.

An<sup>n</sup> action of *scandalum magnatum* may be maintained by a viscount<sup>o</sup>, tho that dignity was created subsequent to any of the before-mentioned statutes, or by any<sup>p</sup> peer of Scotland, tho not one of the sixteen elected to the British parliament.

<sup>m</sup> Westm. 1. 3 E. I. c. 34.

<sup>n</sup> In 4 Bac. abr. 405, it is said to be holden, that a woman, noble by birth is not intitled to this action: which seems a reasonable opinion, as consistent with the rule of not extending a penal statute: but in the book there cited, (Crompt. of courts 34. a.) it is only made a question, and without any distinction of nobility by birth or marriage.

<sup>o</sup> 3 Cro. 136. Pal. 565.

<sup>p</sup> Com. 439, 440.

This

This action <sup>a</sup> of *scandalum magnatum* is not restrained by the statute of limitations above alluded to, but it may be brought after two years are expired from the speaking of the words. It partakes of the nature of criminal prosecutions in this also, that <sup>r</sup> the plaintiff is not intitled to costs, tho he obtains a verdict.

2. Secondly, persons of inferior rank may support actions for defaming them *in respect to their particular stations in life*. Thus <sup>r</sup> to spread a calumny of a member of parliament as such, of a judge or other magistrate as such, or to reflect upon one engaged in a profession in regard either to his competence or integrity therein, is actionable. To <sup>r</sup> slander a man also in the way of his trade is a sufficient ground of action, without averring any particular damage, as the loss of customers. But if the <sup>u</sup> words be obscure, the declaration must contain a *colloquium*, that is, that they passed in a conversation concerning such plaintiff's trade.

<sup>a</sup> 3 Cro. 535. Lit. 342. <sup>r</sup> 2 Sho. 506. <sup>s</sup> 4 Co. 16. 2.  
<sup>2</sup> Vent. 265, 6. <sup>t</sup> 1 R. A. 60, 61. Fitzgib. 254.

<sup>u</sup> 1 Mod. 19.

3. A third distinction to be attended to is, that words not actionable in themselves may become so where any special damage in consequence of them accrues, as if they be spoken of a young maiden, by means whereof she hath lost an intended marriage. Of this nature is <sup>x</sup> *slander of title*, as it is called; that is, any expressions derogatory from the plaintiff's title to his estate, or alleging that it is incumbered with a rent charge, or the like. For <sup>y</sup> no such words are actionable, unless the plaintiff shews, that by means thereof he lost an opportunity of selling or leasing the estate. But if <sup>z</sup> the defendant claim a title in himself to the lands, no action in this case lies.

If the charge be of a crime punishable by the ecclesiastical law, the slander must generally be prosecuted there. But to calumniate a woman as a common prostitute is actionable by the local custom of London; and in such case a prohibition will be awarded to the ecclesiastical court, because it may be tried by a jury. An additional reason has sometimes <sup>a</sup>

<sup>x</sup> 1 Cro. 197.      <sup>y</sup> Ibid. 2 Cro. 484, 5.      3 Cro. 140, 1.

<sup>a</sup> 4 Co. 18. a.    1 Sal. 14.    1 Cro. 197. 427.    1 Rol. 409.

<sup>b</sup> 1 Freem. 298.

been alledged, viz. lest the defendant should be twice punished. But that principle may well be doubted; for the genuine object of the suit at common law is not punishment, but reparation in damages to the party defamed.

The occasion of speaking the scandalous words must be wilful and malicious, or no action can be maintained. Thus words given in <sup>b</sup> evidence to a servant communicated in confidence to one, who asks it from the former master or mistress, are by no means actionable.

If the scandalous words be *reduced to writing* or *printed*, the publication of the defamatory *libel* is a more aggravated and dangerous injury. But here I must quote the authorita-

<sup>b</sup> 2 Inst. 228. Hutt. 11. 1 Freem. 431.

<sup>c</sup> 1 Durnf. & East 110 &c. But by st. 32 G. III. c. 56, if any person shall give a false character of a servant, either personally or in writing, or assert in writing, that such servant was hired for a time, or in a station, or discharged at a time, or had not been hired in any previous service, contrary to truth, such offender is liable to forfeit, by way of summary conviction, twenty pounds, and ten shillings costs; for default either of immediate payment, or entering into a recognizance to appeal, he may be committed for three months; and the informer, intitled to a moiety of the penalty, is made a competent witness.

tive expressions of Serjeant Hawkins<sup>d</sup> in his valuable compilation, "that no false or scandalous matter contained in a petition to a committee of parliament, or in articles of the peace exhibited to justices of peace, or in any other proceeding in a regular course of justice, will make the complaint amount to a *libel*; for it would be a great discouragement to suitors to subject them to public prosecutions, in respect of their applications to a court of justice; and the chief intention of the law in prohibiting persons to revenge themselves by libels, or any other private manner, is to restrain them from endeavoring to make themselves their own judges, and to oblige them to refer the decision of their grievances to those, whom the law has appointed to determine them."

However such written or printed defamation as doth legally amount to a libel may be prosecuted in an action on the case, subject to much the same rules as defamatory words. But in seeking redress for a slanderous libel, the exact tenor of it must be recited in the

<sup>d</sup> Hawk. P. C. b. i. c. 73. § 8.

declaration,

declaration, to which the \* evidence must minutely conform; the smallest and slightest variation between them defeats the plaintiff's success. In an action for scandalous words *spoken*, it is usual to set forth the expressions with some difference in the several counts, that the proof may at least adapt itself to one of them, and intitle the plaintiff to recover a verdict <sup>f</sup>.

We come now to consider the defence, that may be made to this suit.

To an action for slanderous words spoken, the defendant may plead, that they are true; and that, if proved, amounts to an exculpation. Thus a very serious issue may arise between the parties, the proof of which lies upon the defendant to establish. But this defence must be put upon record in a special

\* 11 Mod. 97; Onslow and Horne, before Blackstone J. at Kingston spring assizes 1770, and many recent cases. It is said however that the *matter* and *substance* of an English libel might have been set forth in Latin, while that was the language of records; but that the word "tenor" imports an exact and literal copy. (11 Mod. 97.)

<sup>f</sup> Yet it has been said, the plaintiff may set forth only the substance of the words. (B. R. Hardw. 305, 6.) Such is not the present practice.

plea. It has indeed been<sup>e</sup> ruled by the authority of lord chief justice Holt, that the truth of the words spoken might be given in evidence *in mitigation of the damages*, tho not pleaded and insisted on as a bar to the action: and still later lord Hardwicke<sup>h</sup> intimated the same opinion. But when in a subsequent case<sup>i</sup>, the same attempt was made in mitigation merely of damages, lord chief justice Lee refused to admit it, saying, "that at a meeting of all the judges upon a case that arose in the common pleas, a large majority of them had determined not to allow it for the future, but that it should be pleaded, whereby the plaintiff might be prepared to defend himself, as well as to prove the speaking of the words; that this was a general rule amongst them all, which no judge would think himself at liberty to depart from, and that it extended to all sorts of words, and not barely to such as imported a charge of felony." This now prevailing opinion is certainly founded in reason and substantial justice.

It is advanced in a very useful compila-

<sup>e</sup> 1 Lord Raym. 727.  
Cunningham's reports) 94.

<sup>h</sup> Rep. B. R. 7 & 8 G. II. (called

<sup>i</sup> Str. 1200.

tion<sup>\*</sup>, that the defendant may justify in an action of *scandalum magnatum*, or for a libel, as in a common action of slander. And with respect to libels charging a man with an indictable offence, it seems now the prevailing doctrine, (tho there are<sup>1</sup> many general authorities, not adjudged cases, apparently to the contrary) that the defendant may plead in bar the truth of the defamatory paper. For<sup>m</sup> such plea was allowed on demurrer in the common pleas; and the cause being removed into the king's bench, that court reversed indeed the former judgment on account of the plea's being too general and indiscriminate; but no notice appears to have been taken of the

\* Bull. nisi prius 8; where 1 Saund. 120 & Burr. 807 are cited; but those were justifications rather from the occasion, than the truth, of the supposed libels, the one being a parliamentary, and the other a judicial, proceeding. So in the case, 4 Co. 12. b. &c, which was an action of *scandalum magnatum* on the statute, the plea was a relation of circumstances to extenuate and explain the scandal, which is considered as a very distinct defence from alleging the truth of it. (Poph. 67. 69. 2 Mod. 166. 1 Freem. 223.)

<sup>1</sup> Mo. 627. 5 Co. 125. b. Hob. 253. Str. 498. 2 Hawk. 194. Rep. B. R. 7 & 8 G. II. (as led Cunningham's reports) 94. Fitzgib. 253, and see the reasoning 3 Bac. abr. 495; but perhaps the effect of these authorities may be in some degree invalidated by its being formerly thought, that the truth might be given in evidence, on the general issue, by way of mitigation.

<sup>m</sup> 1 Durnf. & East 748 &c.

question at large, except that one of the learned judges remarked, that "if the plaintiff had been a common swindler, (as alleged) the defendant ought to have indicted him; but he had no right to libel him in that way;" which may be thought to give some countenance to what now perhaps must be called the old opinion. Still a libel may be very scandalous, and very pernicious in its effects, without charging the party libelled with an indictable offence. In that case, as I know of no determination, that the truth of the libel may be pleaded in justification, I am at liberty to observe, that the prevalence of such an opinion would not be very seasonable, nor very conducive to the peace and welfare of society.—As to the question, whether truth affords grounds of a justification in an action of *scandalum magnatum*, it is said<sup>\*</sup> to have been expressly holden in the starchamber, that in a proceeding on the statute restraining such offence, the defendant cannot justify the speaking from the truth of the words; tho he may explain and extenuate them by the occasion; and the reason is, that the king and his people are concerned in the prosecution, which

<sup>\*</sup> 2 Mod. 166.    <sup>†</sup> Freem. 223.

the plaintiff expressly institutes "*tam pro domino rege quam pro seipso*." But that the suit partakes of the nature of a<sup>o</sup> criminal prosecution, and the defendant is liable to imprisonment, might not now perhaps be thought sufficient reasons against putting such justification on record.

In an action for defamation, if the defendant plead not guilty of the premises, (which is the general issue in all actions upon the case) and also justify the truth of the words, and he desert that issue, or it be found against him, costs shall be given at the discretion of the court, tho the damages do not amount to forty shillings, by virtue of the statute 4 A. c. 16, a law re-

<sup>o</sup> In an indictment or information for a libel, where issue is joined on not guilty, the late st. 32 G. III. c. 60 declares and enacts, that the jurors may give a general verdict on the whole matter, and the judge shall not require them to find the defendant guilty, merely on the proof of publishing and of the sense ascribed to the supposed libel in such indictment or information. The statute does not express, that the truth of the scandal shall be a defence; and is wholly silent as to actions of *scandalum magnatum*, or for a libel; neither shall I venture to draw any inference from it, in those respects.—Perhaps the framers of this law might justly think, sir William Blackstone narrows the liberty of the press too much, when he makes it consist in laying no previous restraints on publications. (4 Black. comm. 151.) They seem to have apprehended, that in some future age, there might be danger from arbitrary prosecutions, as well as from the arbitrary refusal of an *imprimatur*.

quiring frequent mention in this part of our course, supposed to be chiefly the composition of the great lord Somers. And indeed the putting of such special plea upon record, and afterwards deserting of it, may reasonably influence a jury to be liberal in assessing the satisfaction to be recovered.

I am next to speak of an injury more heinous than any defamation, and which at once endangers the plaintiff's *character and safety*, I mean the guilt of concerting a *false and malicious prosecution*. This offence is taken notice of in several of our<sup>p</sup> earliest acts of parliament. The law in this case gave a specific remedy by a *writ of conspiracy*; in which<sup>q</sup> the defendant on conviction was liable to imprisonment, as well as to render the damages assessed to the party aggrieved, such proceeding in that respect resembling the action of *scandalum magnatum*. Conspiracy<sup>r</sup> implied a plurality of persons; and the writ therefore could not be brought against a single defendant: but an action upon the case for a false and malicious prosecution may be commenced

<sup>p</sup> St. 28 E. I. ft. 2. c. 10.    <sup>33</sup> E. I. ft. 2 & 3.    <sup>4</sup> E. III. c. 11.    <sup>q</sup> 1 Hawk. 193.    <sup>r</sup> F. N. B. 260, 1.

against

against one or more ; and the other proceeding is now almost wholly antiquated. If the malicious indictment be <sup>s</sup> only for a trespass, or be <sup>t</sup> insufficient in itself and liable to be demurred to, or thrown <sup>u</sup> out by the grand jury, in all these cases the party indicted may have been unjustly harrassed, for which injury an action lies. But where a <sup>x</sup> party was indicted of *barratry*, (that is as a common mover, exciter, or maintainer of suits or quarrels) and set forth in his declaration, that he was in due manner discharged of the accusation supposed to be malicious, and it appeared upon the trial, that he was not otherwise discharged thereof, than by the entry of a *nolle prosequi*, this was holden insufficient to maintain the action. For the *nolle prosequi* was so far from acquitting him of the offence, that it did not even preclude farther prosecution, but the crown might order new process on the same indictment. On the other hand, if he had pleaded not guilty to the indictment, and the attorney general had confessed the truth of this plea, an action for the ma-

\* Carth. 416, 7.

\* 1 Sal. 14, 15. Str. 691.

<sup>u</sup> 1 R. A. 114. Yel. 46. Lat. 79. 1 Sal. 14, 15. 2 Cro. 490.

\* 1 Sal. 21. 6 Mod. 261, 2. It is the same in respect to other crimes. (2 Durnf. & East 231, 2.)

licious

licious prosecution might then have been supported. For<sup>y</sup> if the indictment be once found by the grand jury, the plaintiff must shew, how it was determined; and the<sup>z</sup> defendant is not then bound to prove a probable cause of prosecuting, but it lies on the other side to evince an express rancor and malice. Indeed it seems<sup>a</sup> in all cases necessary, for the plaintiff to shew, presumptively, both malice, and also the want of a probable cause of prosecuting. From the want of a probable cause, malice *may* be implied, but not *e converso*. And if a man, tho from a malicious motive, take up a prosecution either for real guilt, or which on plausible grounds he believes to be so, an action does not lie.—The old<sup>b</sup> writ of conspiracy could not be brought except where there had been an acquittal; in that case therefore a copy of the record was necessary to be obtained in order to prove such preceding verdict. We have seen that the action upon the case lies for a prosecution without any trial, and consequently without an acquittal. But where there has been a trial, it is usual to petition the court, before

<sup>y</sup> Str. 114.      <sup>z</sup> 1 Sal. 15. Bull. nisi prius 14.

<sup>a</sup> 1 Durnf. & East 544, 5.

<sup>b</sup> 1 R. A. 114.

which

which the criminal prosecution was instituted, for a copy of the record, as a necessary proof for the plaintiff to be furnished with in the intended action upon the case. The court exercises its discretion in complying with or rejecting this application, weighing on the one hand the danger of discouraging just and necessary prosecutions, and on the other, the apparent probability, that the accusation was founded in malice ; on which latter supposition, it is hardly conceivable, how too excessive damages, in some instances, can be given. If the copy of the record be denied, where there has been a trial upon the indictment, the action for a malicious prosecution must be dropped ; as it is impossible to obtain a verdict without that best, and therefore only admissible, evidence of the prior acquittal.

I am now to consider the redress, by action, of injuries detrimental to the *health* or *quiet* of individuals. As these affect the plaintiff in respect to his local habitation, they may also be looked upon as injurious to his property, by rendering his dwelling house inconvenient and of less value. Thus if a man, near the  
manfron

manſion of another, ſet up and exerciſe an offensive and unwholeſome trade, as keeping a ſmelting furnace, an action upon the caſe may be commenced for damages. For<sup>c</sup> that buſineſs was thought ſo pernicious to the plaintiff's cattle and meadow as to warrant a ſuit at law; and it muſt be eſteemed much more injurious and properly actionable, if brought near his habitation. The ſame<sup>d</sup> remedy may alſo be purſued for erecting a ſmith's forge near the dwelling houſe of another, as the loud and conſtant noiſes attending that occupation were an intolerable diſturbance by day and night. Theſe paſs under the general denomination of *nuiſances*; of which there are likewiſe many other kinds. Thus the familiar inſtance of obſcuring the antient windows of the plaintiff by building againſt them is an actionable wrong. Sometimes mere *omiffion* may be conſidered as productive of a nuiſance. Thus if a man be bound to maintain the fences between his cloſe and mine, and neglect to repair them, by means whereof the cattle of any ſtranger come on my land, or my own cattle eſcape into the highway, an action lies. An action

<sup>c</sup> 1 R. A. 89.<sup>d</sup> Lut. 69 &c.

\* also is maintainable against the owner of tithes regularly set out, who neglects to remove them after notice, whereby they become an incumbrance and detrimental to the land. What a man does upon his own premises may frequently be deemed a nuisance; as<sup>f</sup> if he fix a spout to his house, where there was none before, and by means thereof the water be thrown into the plaintiff's yard, an action may be commenced for this grievance.—In these<sup>g</sup> cases the declaration need not set out a derivative title, but it is sufficient to allege generally, that the plaintiff was lawfully possessed of the house, or other property, that received damage.—Other injuries, similar to the foregoing, and for which this action may be brought, are such as causing the plaintiff's close to be overflowed by not repairing a dyke, which the defendant by tenure or otherwise was bound to keep in order; diverting the plaintiff's watercourse by damming up the stream; and other acts, by which his property is not *directly* invaded, but sustains damage by reason of something done at a distance, or on the defendant's own ground or

\* 1 R. A. 109.

<sup>f</sup> Fort. 212.

<sup>g</sup> See lord Raym. 1569. 1 Sho. 7.

property,

property, which being consequentially injurious to the plaintiff, is therefore considered as a nuisance, or actionable wrong.—The declaration may express a *continuance* of the nuisance from one period of time to another, both particularly alleged; and <sup>h</sup> it is no plea to say, that such nuisance is now removed by the defendant, or abated by the plaintiff himself.

But we must distinguish between public and private nuisances. The Roman civil law is in this respect very indiscriminate. “*Sciendum<sup>i</sup> est, de omni injuriâ eum, qui passus est, posse vel criminaliter agere, vel civiliter.*” With us on the other hand, if the inconvenience be general, as stopping up a common highway or common ferry, by which means the plaintiff could not use them, the damage, which he sustains, being the same as is equally incurred by all the king’s subjects, in <sup>k</sup> this case no private action is allowed, in order to avoid a multiplicity of suits; and the law has provided an apter remedy by indictment. But <sup>l</sup> if by reason of a public nuisance, a man suffer

<sup>h</sup> 1 Freem. 230. Fort 333.

<sup>i</sup> Inst. l. iv. t. 4. § 10.

<sup>k</sup> 1 R. A. 88. Carth. 193.

<sup>l</sup> 5 Co. 73. a. 2 Cro. 446. 1 Inst. 56. a.

any special and extraordinary damage, as if by logs placed or a ditch dug in the highway he be thrown from his horse and bruised, here he shall maintain an action for his particular detriment, which is not common to others. This <sup>m</sup> however does not extend to intitle one, who has received detriment by a county bridge being out of repair, to bring an action against the inhabitants of that county, there being no ground to consider them, for this purpose, as a corporation, and in that capacity liable to be sued.

Actions upon the case for private nuisances are sometimes but another designation of such as are brought for the *disturbance* of some peculiar right or easement, belonging to the plaintiff; of which, among others, I shall treat in the ensuing lecture.

<sup>m</sup> 2 Durnf. & East 667 &c.

## LECTURE XLIX.

*Of the remaining species of actions on the case.*

IN this lecture, I shall mention, under different classes, various injuries remediable by bringing an action on the case, which in the last discourse were reserved for our present disquisition, and which affect, not the plaintiff's person, but his property. That I may observe some delineated method in this disjointed title, I shall first speak of actions seeking redress for injuries to the plaintiff's *reversion in real estates*; secondly, of such as are brought for *disturbing him in some incorporeal right or hereditament*; thirdly, fourthly, and fifthly, of such as are brought for *deceit, or negligence, or wilful misfeasance*; sixthly, of actions of *trover and conversion*; and lastly, of such as are grounded on a *particular act of parliament*.

I. As

I. As to wrongs immediately affecting real property of a corporeal nature, an action of trespass *vi et armis* is the proper mode of redress, provided the plaintiff has the present possession of the estate. But where his interest is only of the future expectant kind, such <sup>a</sup> *reversionary* proprietor may have an action on the case, and the other action of trespass *vi et armis* may also be maintained by the immediate occupier: as where the defendant by stopping up a rivulet had flooded an adjacent close, and destroyed great quantities of timber, both these remedies were allowed to be pursued for the damage respectively sustained. So also if the owner or occupier of lands contiguous to those, of which I have the reversion, dig and make a fence in my close, in order to throw part of it into his own premises, my tenant in possession may have an action of trespass *vi et armis*, and I, the landlord, may have an action on the case, in respect to the damage done to my reversion.

A reversioner for waste done by his own lessee has usually redress at hand under the

<sup>a</sup> 3 Lev. 209.

covenants of the demise; but he may waive that and his other remedy by action of waste, and<sup>b</sup> bring an action upon the case; as he may also for the same injury committed by any one, who has a present or particular estate in the premises, or by a mere stranger, whether, in the last instance, the tenant in possession sues in trespass *vi et armis*, or declines it.

II. From injuries to a reversionary interest in lands, we are led, secondly, to consider such as affect any *incorporeal right or franchise* of the plaintiff. These may (as was observed at the close of the last lecture) be denominated private nuisances; and the remedy for them is frequently called an action upon the case for a *disturbance*. Thus<sup>c</sup> a right of *common* may be disturbed in an actionable manner by inclosing, ploughing, or surcharging the place where it is claimed, or by putting cattle there without authority. And<sup>d</sup> tho the plaintiff hath a freehold interest in his right of common, he may sue in this personal

<sup>b</sup> 3 Lev. 131.      <sup>c</sup> 2 Cro. 629, 630. 1 Cro. 198, 9.  
2 Leon. 184. Lut. 107. 9 Co. 111. b. &c.

<sup>d</sup> 1 Cro. 198, 9. 2 Leon. 184.

action, and is not under the necessity of bringing an assize.

Another <sup>e</sup> right, the disturbance of which may be redressed by an action upon the case, is that of *way*, whether it depends upon an express reservation in any modern deed, or upon grant, or antient and immemorial prescription. This <sup>f</sup> easement may be obstructed in an actionable manner, not only by stopping up the way or passage, but by ploughing up the land, over which the way lies.—And in these <sup>g</sup> cases it is sufficient, as against a mere wrongdoer, for the declaration to allege generally, that the plaintiff was lawfully possessed of a certain tenement, and by reason thereof intitled to the way, or the common, in question, without deducing a regular title from any person seised in fee. For against a mere stranger or wrongdoer, (and such the defendant would admit himself to be by demurring) possession is a sufficient title.

The same action may be brought for disturbing the plaintiff in his right to a seat or

<sup>e</sup> 1 R. A. 109.

<sup>f</sup> 2 Vent. 186. 2 R. A. 140.

<sup>g</sup> 1 Vent. 274, 5. Com. 7, 8. 4 Mod. 423.

pew in a parish church for himself and his family, as appertaining to a messuage, of which he was lawfully possessed. On<sup>h</sup> such occasion, an action of trespass *vi et armis* will not lie, because the freehold and imputed *possession* of the church is in the parson. A<sup>1</sup> parishioner may acquire a right to a pew by prescription, as appurtenant to a messuage, or by applying to the ordinary for a *faculty*, and perhaps by allotment and agreement with the minister and churchwardens, especially where the church is rebuilt. Yet this last mode may be more safely accomplished by the ordinary's authority, unless there is<sup>k</sup> an immemorial custom for disposing of seats by the churchwardens and major part of the parishioners, or the like. In<sup>1</sup> all cases it seems necessary to claim the pew as appurtenant to a *messuage*, in the declaration. A<sup>m</sup> faculty to a man and *his heirs* is not valid; nor<sup>n</sup> a prescription claiming a seat or pew as appurtenant to *land*.—Where<sup>o</sup> this action is brought

as

<sup>h</sup> 1 Durnf. & East 430.<sup>i</sup> Ibid. 431, 2 & n.<sup>k</sup> 1 Burn eccl. law 329, 330. (ed. 1767.)<sup>1</sup> 1 Durnf. & East 428 &c.<sup>m</sup> Ibid. 432. Burn ibid.<sup>n</sup> 1 Burn eccl. law 331.

<sup>o</sup> 3 Lev. 73, 74. 1 Will. 326, 7. See 3 Durnf. & East 639 &c. In which case the king's bench held the sentences  
in

as against a stranger or wrongdoer, it is sufficient for the plaintiff to allege in his declaration, that he is intitled by prescription to the pew in question as appurtenant to his messuage, without farther stating the particulars of his claim; and tho repairs are mentioned, they need not be proved. But against the ordinary, who has *primâ facie* the disposal of all the seats in the church, a title or consideration must be shewn in the declaration and proved, as a faculty from one of his predecessors, having built at a distant period, or by due authority, such pew, or having constantly<sup>p</sup> repaired the same.

Besides the rights hitherto enumerated, this action is the proper remedy for disturbing the plaintiff in the enjoyment of any property or franchise, which he is lawfully possessed of or intitled to, as a prescription to receive, or to be exempted from paying any antient<sup>q</sup> toll, or other manerial privileges; or

in the ecclesiastical courts were not *conclusive* evidence of the right. But that case does not seem to afford any general rule. For the two superior ecclesiastical jurisdictions appear not to have decided positively on such right.

<sup>p</sup> 2 R. A. 288. pl. 3, 4.

<sup>q</sup> But in such case, *assumpsit* is now usually brought. (1 Durnf. & East 616 &c. 660 &c.)

for the injury of obstructing the execution, or intercepting the profits, of an ' office. So where an immemorial usage has prevailed, that all the inhabitants of a parish, or tenants of a manor, shall have their corn ground, or their bread baked, at a certain antient mill or oven, if they neglect so to do, they are liable to this action. The two last instances favor of the simplicity of early ages, but are by no means wholly out of use.—These and similar cases fall under the denomination of actions for a disturbance.

III. Another occasion, and a very multifarious one, of bringing this action is, thirdly, where a man uses injurious *deceit* to the prejudice of another. This is usually called an action *upon the case for a deceit*. Every breach indeed of a real or implied *assumpsit* may be construed as fraudulent. But in the instances, which I am about to consider, no valid contract is supposed to have ever intervened, and the deceit is referred to the original dealing between the parties; so that the suit arises simply *ex delicto*. This action there-

\* See 2 Mod. 228.

fore may be commenced for deceit in sales, as for vending damaged wares or provisions, unsound horses, or the like, at a price, which such articles usually cost in a good and merchantable condition, ' altho no ' express warranty, or affirmance of their value, was made by the defendant. Neither " is it incumbent on the plaintiff to prove at the trial, that the defendant knew the things sold to be of such trivial or inferior worth. For a man ought to have skill in the way of his business, and to be acquainted with the value of his wares: and ignorance in this behalf may be considered as a deceit upon those, with whom he deals. The same reason holds, tho not with equal strength, where the vendor is not actually engaged in a trade. But where the defendant had sold, as his own property, a horse, which really belonged to another, it was \* formerly adjudged necessary, for the

\* Vol. II. 415.

\* If there be an express warranty, not respecting the soundness merely, but of some distinct matter, as concerning the age of horses, which is contrary to truth, and the seller refuse to take the goods again, whereupon the buyer resell them to a third person, still such buyer may obtain recompence by law: but in either case this is not now the *usual form* of action. (2 Durnf. & East 745, 6.)

" Skin. 66. 1 Vent. 366.

\* Al. 91.

plaintiff to prove, that it was done fraudulently, and with a knowledge, that such stranger was in effect the rightful owner. For the horse might have been fairly and innocently bought by the second seller. There may be some distinction between the cases, tho perhaps it would be hardly thought sufficient at this day to warrant a different decision; at least in the latter instance, the plaintiff might, it seems, recover back the price in an action of *assumpsit* for money had and received.

If a broker, or other person, employed by the plaintiff, have conducted himself fraudulently, and contrary to the trust reposed in him, an action upon the case lies for such deceit. This <sup>v</sup> remedy also may be pursued, where a man assumes a fictitious character, falsely personating the plaintiff himself, or any stranger to the plaintiff's detriment. The same action may be brought against a man, who professes any trade or science, and the plaintiff confiding in his pretended skill is thereby deceived and damnified. An action

<sup>v</sup> 1 R. A. 100. Moor 538; see post 215. and the ft. 30 G. II. c. 24. and the references there cited.

is <sup>a</sup> recorded to have been brought for a much more injurious species of deceit. The declaration stated, that the plaintiff being a young woman of good fame, and sought for in marriage by a person therein named, the defendant, pretending himself single, obtained her consent, and intermarried with her, whereas he had then living another, his real, wife. In other books <sup>a</sup> it is said, that a similar action was not maintainable, because the fact <sup>b</sup> amounts to felony, which can never be a ground for a private suit, at least till after a pardon or the eventual effect of a public prosecution. This latter opinion seems the just one, unless perhaps seven years had elapsed without the former husband or wife having been heard of, which excuses from the guilt of felony. However, where a <sup>c</sup> man, falsely pretending himself single, only solicits, but does not actually contract, a second marriage with the plaintiff, and she sustains special damage in conse-

<sup>a</sup> Skin. 119.

<sup>a</sup> 1 Lev. 247, 8. 1 Sid. 375.

<sup>b</sup> St. 1 J. I. c. 11.

<sup>c</sup> Such action was commenced Mich. 6 G. III. B. R. by Ann Thomas Spinster against John Wycliffe Esquire: in which the declaration was prepared by Mr. Wallace, in the form of an action upon the case.

quence

quence of such deceit, as by rejecting other offers, there can be little doubt of her right to sue this action.

Farther, an action<sup>d</sup> upon the case may be brought for using deceit in games of chance, and thereby winning the plaintiff's money, as by playing with false dice, or the like. This is allowed by the common law, besides the several restraints upon gaming, introduced by particular statutes.

Lastly<sup>e</sup>, if there be an intention to deceive, as by falsely representing a third person to be a man safely to be trusted and given credit to, and the plaintiff trust him accordingly, and be damnified in consequence thereof, this action lies, without proving that the defendant, who made such assertions, was any gainer thereby himself, or colluded with him, of whom he gave the fictitious character.—The foregoing instances may serve to shew the occasions, where this action is the proper remedy, in respect to deceit.

#### IV. Another class of actions on the case is

<sup>d</sup> 1 R. A. 100.

<sup>e</sup> 3 Durnf. & East 51—65.

referred

referred to *negligence*; where the act is generally lawful in itself, but done in an improper place or manner, or without sufficient care, whereby the plaintiff hath sustained damage. A principal instance of this kind<sup>f</sup> was the case of fire, which, being negligently kept in one house, had extended to another, and consumed it or the goods there. But now by the st. 6 A. c. 31, made perpetual by the st. 10 A. c. 14, no suit can be commenced in this particular, the legislature compassionately considering, that, where there is no imputation of wilful malice, the party's own loss creates a severe suffering for his neglect. To proceed therefore,—if a man shoot off a gun in the middle of a town, by means whereof the plaintiff's horse start and throw him, this is such an instance of negligence as will warrant an action. Masters<sup>g</sup> also are answerable for the negligence of their servants; as if through the want of skill or care in the person driving a dray, it be forced against and break the plaintiff's carriage. And in a<sup>h</sup> case, where the defendants were charged in the declaration with bringing two ungovernable horses harnessed to a coach into a

<sup>f</sup> 1 R. A. 1.<sup>g</sup> Vol. I. 465, 6.<sup>h</sup> 2 Lev. 172, 3.

place much frequented, which by reason of their untractableness ran upon and wounded the plaintiff, the action, after verdict, was adjudged maintainable against both the master and the servant, tho the former was absent, and tho there was no allegation, that they knew of the untameness of the horses, because it was stated to be done improvidently and without due consideration of the unfitness of the place, which was a sufficient charge of actionable negligence,

Thus also if a man be the owner of any noxious or ferocious animal, which does mischief; as<sup>i</sup> if *knowing*, that his dog is used to bite sheep, he continue to keep him, and the dog chase and wound the plaintiff's flock, this kind of action may be used,

The remedy is the same for the negligence of persons in particular stations and offices. As if a prisoner arrested at the plaintiff's suit, through the negligence of a sheriff or gaoler, make his *escape* out of custody before judgment, this action may be brought; if after judgment, an action of *debt*, because then ge-

<sup>i</sup> 1 R. A. 4. 2 Sid. 127.

neral damages are not to be assessed by the jury, but a specific sum to be recovered by the verdict is reduced to a definite certainty. So an action upon the case lies against a <sup>\*</sup>*common inn-keeper*, if the goods of his guest be stolen or lost by the negligence of himself or his servants; or against a <sup>1</sup>*common carrier* of goods for hire by land or water, if they miscarry; these cases being usually said to be founded on the common custom of the realm, which is referred to by the <sup>m</sup> declaration.

To this head of negligence may be referred the action upon the case for *dilapidations*, which may be sued either against a late incumbent, who has resigned a benefice, or

<sup>\*</sup> 2 Cro. 224.

<sup>1</sup> 1 R. A. 2. See 1 Sal. 282.—In these cases, actual negligence is not always necessary to support the action. A carrier is compared to an insurer, and is liable for every accident except by the act of God, or of the king's enemies: the former means such events as could not happen by the intervention of man, as storms, lightning, and tempests; and does not include loss by fire, or other casualty, effected with the concurrence of human means, tho inevitable in respect to the party charged with the loss; the latter seems restricted to public enemies; and seizure by an armed force of rebellious subjects will not excuse. (1 Durnf. & East 33, 34.)—As between the vendor and vendee, if the latter direct the mode of carriage, the former is excused. (Cowp. 296.)

<sup>m</sup> That is, when the plaintiff sues in this mode, instead of bringing an *assumpsit*, as is now more usual.

against

against the personal representative of a deceased rector or vicar. Here also the declaration states the general law, that all rectors ought to keep in repair the chancels of their churches, and all the premises in their occupation. The st. 13 Eliz. c. 10. § 2, which relates to dilapidations, mentions no remedy in the temporal courts; and it does not appear to have been settled till above a century afterwards, that the ecclesiastical successor could sue at common law, when<sup>a</sup> that point was decisively adjudged. An<sup>o</sup> action for dilapidations

<sup>a</sup> 3 Lev. 268.

<sup>o</sup> 2 Durnf. & East 630 &c.—Besides the general reason of the thing, it may be urged in support of that determination, that the doubt in law was, whether the matter was not suable only in the spiritual court; when therefore it had been decided, that an action at common law was maintainable in one case of dilapidations, it follows to be so in all, prebendaries being expressly named in the statute.—As to the two precedents there quoted from Lut. 116, 7, 8, both brought for vicarial dilapidations, they both allege such custom as to prebendaries, rectors, and vicars; but the former also adds “ministers of free chapels and chaplains of chantries” who are omitted in the latter. That reporter tells us, judgments were given in both for the plaintiff: but Levinz says, that the rolls had been searched, and that no judgment was given in the former of them, Hil. 15 J. I. roll 474. The second precedent was only about five years after the case in Lev. and there appears to have been no such action brought from the 15 J. I. till 3 J. II. (Lev. 268.) There is also, Lut. 115, a precedent later than those quoted in 2 Durnf. & East, against a rector who had resigned, alleging the custom as to rectors only; and this agrees with a M.S. precedent which I have, and

lapidations also lies for the neglect of repairing a *prebendal* house by a succeeding prebendary against the predecessor, or his personal representative, as well as in the case of parochial preferments.

V. Actions upon the case for *wilful misfeasance* are sometimes spoken of as a distinct class, tho many of the instances already enumerated may be considered in that light. Other examples of this kind, not hitherto alluded to, may be, like the following, contempts or abuses of the process of the law, as if an attorney sue in another's name without a warrant; if a <sup>p</sup> party be arrested without any cause of action, and maliciously holden to bail; if a <sup>q</sup> commission of bankruptcy be taken out through mere malice; if a <sup>r</sup> man from malicious motives obtain and execute a warrant, (as under the st. 10 G. I. c. 10. § 13.) to search for concealed goods, where none are

and which seems accurately drawn. I conclude therefore, that in an action either for prebendal, rectorial, or vicarial dilapidations respectively, it is not necessary to state the rule as to ecclesiastical preferments of every denomination, but as to that only, to which the cause relates.

<sup>p</sup> 3 Durnf. & East 185.

<sup>q</sup> 2 Wils. 145.

<sup>r</sup> 1 Durnf. & East 535.

found;

found; or if a sheriff, by positive connivance, (not simple negligence) suffer an escape. Of this kind are wilful offences by 'officers intrusted with any part of the execution of the law, by whose misconduct a private damage is sustained. Thus if a 'freeman of a corporation, intitled to vote at the election of mayors, be not permitted to poll, it seems, he may maintain this action against the returning magistrate. This is confirmed by the reasoning of lord chief justice Holt in the great case of "Ashby and White, where the action was for refusing the plaintiff's vote at the election for members of parliament. Whether such suit could be maintained, still, I believe, divides the sentiments of lawyers. The existence of a civil right, without a competent remedy to redress its violation, is treated as an absurdity, and repugnant to our general principles of jurisprudence. Perhaps the consistency of the law may in this respect be vindicated by reflecting that the sending of

\* This action is also maintainable for a malicious abuse of delegated authority of the highest nature: as where the governor and vice-admiral of one of his majesty's islands suspended the judge of the vice-admiralty court from the exercise of that office, maliciously and without any reasonable or probable cause. (1 Durnf. & East 538.)

† 2 Lev. 250, 1.

\* Lord Raym. 938 &c.

members

members to parliament was antiently considered as a duty rather than a franchise. But without entering farther into that, or the other argument, (viz. as to the returning officer being a judge, or *quasi* a judge, and so not liable to be sued) to me it seems unconstitutional, that the right of voting for the representatives of the people should be the subject of discussion in an action, of course finally determinable by writ of error in the house of lords.

An action upon the case, being a supplemental course of proceeding, where there is no appropriated remedy, lies in cases, not specially provided for, of damage unjustly sustained. . Other acts then of wilful misfeasance, remediable in this way, happen, where any unjust hindrance is given to a man in the acquirement of his lawful emoluments; as to a rector<sup>w</sup> in taking his tithes; or where<sup>x</sup> a tradesman's profits are unduly intercepted by threatening his customers or workmen. Thus also it is, if a<sup>y</sup> deed, under which I claim a beneficial interest, come into the possession of another, who defaces it, or tears off the seal,

<sup>w</sup> 2 Inst. 650.<sup>x</sup> 2 Cro. 567, 8.<sup>y</sup> 2 Cro. 255.

he shall answer in this action for the damage, which I may have incurred. For actions upon the case being substituted, where no regular or specific remedy was appointed, must of course include injuries of anomalous character. To mention therefore another instance of a peculiar nature,—if a <sup>2</sup> parson deface a gravestone or coat armour in a church, which may be a useful memorial, and hath been a burthenfome expence to a family, an action upon the case lies. This is plainly a wilful and direct injury, for which however *trespass vi et armis* cannot be brought, because the freehold of the church is in the rector.

Other species of actionable misfeasance may disturb the domestic relations of life, <sup>a</sup> as if a man intice a servant, apprentice, or journeyman from their respective masters. Of a like kind was the cause of action, <sup>b</sup> where the defendant falsely and maliciously wrote a letter to a person, who was engaged to take the plaintiff as his wife, suggesting, that he was

<sup>a</sup> Godb. 200. 2 Cro. 367.

<sup>a</sup> 2 R. A. 556.—In all such instances *either* an action on the case, or of trespass *vi et armis*, will lie, and perhaps sometimes *both* on the same occasion. (Cowp. 54 &c.)

<sup>b</sup> 1 Lev. 53. 1 Sid. 79, 80.

her husband, by means whereof the intended marriage was frustrated. For as the letter does not appear to have contained any thing libellous, this cannot be ranked among actions of scandal. It seems, unless some special damage could have been proved, this cause would have been proper only for the ecclesiastical court, under the name of a suit for jactitation of marriage.—To these and similar instances, the legal remedy by an action on the case for misfeasance may be applied, it being necessary to remember, that<sup>c</sup> the ground of complaint be not *damnum absque injuriâ*, but that there be actual detriment injuriously sustained.

VI. Another kind of action upon the case, very frequent in practice, is that of *trover and conversion*; in which the declaration surmises, that the plaintiff's goods came by *finding* into the defendant's possession, who wrongfully *converted* them to his own use. This form of action is not very antient. Not much more than a century ago, it was said,<sup>d</sup> tho a *new*, to be a just remedy. It is brought to obtain

<sup>c</sup> 3 Durnf. 51—65.

<sup>d</sup> 2 Freem. 54.

a satisfaction in value for the goods, as *detinue*, spoken of in a former lecture, seeks a specific restitution of the things themselves. Trover is the most general mode of trying the right of property in any personal chattels, whether disputable under the<sup>e</sup> bankrupt laws, or otherwise. The finding is commonly a mere fiction in the formal part of the suit; for all sorts of property, as *ships*<sup>f</sup>, may be the subjects of actions of trover. This<sup>e</sup> form supposes, that the defendant may have come rightfully by the goods. It waives the trespass in taking, and relies on the wrongful possession only. To intitle the plaintiff to recover in this action, two things are necessary to be proved, property in himself, and a wrongful conversion by the defendant to his own use. The most usual evidence of conversion is proof of a refusal to deliver the goods on demand: this is sufficient. The law is the same, if the refusal is conditional, as not to deliver the goods to the true proprietor except on certain terms, which the defendant has no right to impose. But if<sup>h</sup>

<sup>e</sup> See 1 Durnf. & East 475—482. 3 Durnf. & East 316—313.  
<sup>f</sup> 2 Durnf. & E 462. 3 Durnf. & East 406.

<sup>g</sup> Burr. 31. 2477.

<sup>h</sup> Case of *Hayes* before lord Mansfield C. J. at nisi prius Hil. 1782.

the goods can be reasonably said to have been in the defendant's custody by the plaintiff's *licence at the time of the action brought*, it is a sufficient objection, and will defeat the suit. I have before mentioned, that the plaintiff must prove property in himself, which is available without ever having had the custody of the things in question. For this<sup>1</sup> action may be brought by an executor, or other person, who never had the actual possession of the goods. But the plaintiff must prove, that *while* the goods were his property, they came to the possession of the defendant. If therefore<sup>k</sup> stolen goods, before conviction of the felon, be *bonâ fide* sold in market overt, the property is hereby changed; and tho conviction reverts the original ownership, yet cannot such owner even then maintain this action for damages against one, who was not in possession of them at the time of the conviction, tho he has a right to restitution, if he can find the possessor, and ascertain the specific articles. In some<sup>1</sup> cases, the proceedings have been stayed by the court, on payment of costs, and bring-

<sup>1</sup> 1 Cro. 377, 8. 1 Bul. 68, 69.  
750—756. See Vol. II. 411, 2, 3.

<sup>k</sup> 2 Durnf. & East  
<sup>1</sup> See Burr. 1363.

ing the goods to be delivered to their owner; but this would frequently be an inadequate recompence.

VII. The last species of actions upon the case, which I shall mention, are such as are grounded upon some *statute*. For<sup>m</sup> every act of parliament, made for the redress or prevention of any injury or grievance, will found an action for things done contrary thereto, if not by express words, by legal implication. I am speaking here of statutes, which do not impose any pecuniary mulct; for in those cases, as we have before seen, an action of debt must be sued. But where no specific penalty is inflicted, an action on the case may be commenced, grounded on the statute, as<sup>n</sup> against the returning officer, for a false return of members to serve in parliament; in which case the party aggrieved is intitled to recover, not any determinate sum, but double the damages that a jury shall assess. Such is the<sup>o</sup> action against the hundred for a robbery; (the

<sup>m</sup> 10 Co. 75. b. 2 Inst. 55. 118.

<sup>n</sup> St. 7 & 8 W. III. c. 7.

<sup>o</sup> St. Winch. 13 E. I. ft. 2, c. 2. See 2 Saund. 374.

old statute, on which it is founded, impliedly making<sup>p</sup> the inhabitants, for this purpose, a corporation) and such also that<sup>q</sup>, which may be prosecuted for cheating by false signs and tokens, tho it is also an indictable offence. To this head likewise must now be referred the redress sought for any violation of<sup>r</sup> literary property. For since that right is no longer holden to subsist at common law, but, according to the conclusive determination of the supreme court of judicature in this kingdom, formerly noticed, rests wholly on the protection afforded by the<sup>s</sup> statute of queen Ann, any invasion of such exclusive claim must be redressed in an action founded on and reciting that act of parliament. Of the same nature are actions upon the case brought for invading a<sup>t</sup> patent right, granted by his majesty for the exclusive practising, making and vending of some new invention or manufacture. For the legality of these patents now depends on a proviso in a statute<sup>u</sup> of James the first; and therefore actions brought for infringing

copy right

patent right

<sup>p</sup> 2 Durnf. & East 672.<sup>q</sup> St. 30 G. II. c. 24. See 2 Durnf. & East 581 &c.  
<sup>3</sup> Durnf. & East 98 &c.<sup>r</sup> Vol. II. 393, 4.<sup>s</sup> 8 A. c. 19.<sup>t</sup> Vol. II. 395, 6.<sup>u</sup> 21 J. I. c. 3. § 6.

such sole privilege are properly to be referred to that act, and not to the common law. In such action, the plaintiff must prove, that the invention was new in itself, or new within this realm.

Before I conclude this lecture, it is proper to observe, that several occasions of bringing actions on the case, as against a \* common carrier, or for deceit, in selling unsound horses, or the like, are, especially of <sup>y</sup> late years, usually *declared upon in assumpsit*: because something being commonly paid down, the plaintiff by adding a count for money had and received, may recover thereupon, and prevent at least a nonsuit. Whereas <sup>z</sup> a count in *assumpsit* cannot be added or joined to a declaration in an action upon the case, specially so called. For actions upon the case are considered as founded upon *tort*; and therefore the general issue is, that the defendant is “*not guilty* of the premises in manner and form as A. (the plaintiff) hath above complained

\* 1 Durnf. & East 277.

<sup>y</sup> About twenty-five years ago it was very usual to bring an action upon the case for deceit in sales.

<sup>z</sup> Carth. 188, 9.

thereof against him."——The <sup>a</sup> plaintiff must, in general, prove his whole declaration; and, on the other hand, any thing, that exculpates the defendant, may be given in evidence by him, without pleading it on the record.

Thus I have endeavored in some measure to characterise the several kinds of actions upon the case, and, by selecting such examples, as appeared necessary under each distribution, to convey the means of judging, in what instances of damage unjustly sustained, this remedy is proper to be pursued for obtaining compensation. It seemed a method better suited to the memory, and to practical utility, to bring these anomalous points of law under this extensive title, to which they all refer, and of which they serve to frame the collective idea, than to leave them scattered in different parts of these lectures. And it was intended, that the principles of the cases cited should be easily applicable to those, not mentioned, falling under the like reason.

<sup>a</sup> Str. 872.

Having now finished our inquiries into the nature of these actions, which arise simply *ex delicto*, I shall proceed to such as have the imputation of *force*; and shall in the next lecture speak of the action of *replevin*, and incidentally of the doctrine of *distresses*.

## LECTURE L,

*Of the action of replevin, and other actions relative to the doctrine of distresses.*

THE third general class of personal actions, according to the division of them formerly made, comprehends such, where the injury, for which they are brought, is supposed to be accompanied with force. Of this sort may be accounted actions of *replevin* and of *trespass*. For tho in the former it is not usual to insert the words "force and arms" in the declaration, yet it complains of a direct and immediate invasion and carrying away of the property in question,

The word "*replevin*" is interpreted to signify a substitution of one pledge in the room of another. For it is brought, where goods or cattle are taken or distrained, the legality of which taking or distress is intended to be contested. To this end they are delivered back to the claimant, upon his undertaking,  
in

in the form of the condition of a bond entered into with the sheriff, to try the right in an action, and to restore the things taken, if such should be the determination of the suit. This subject therefore seems not an improper occasion to introduce some inquiry into the nature of *distresses*; which are an expeditious method allowed in some cases of obtaining justice, by seizing the goods of another, in order to compel the payment of money, or the performance of some duty. The thing taken and the act of taking it are each of them indifferently called a distress.

I. The most usual occasion of distraining is for *rent in arrear*. This<sup>a</sup> cannot be made till the day after the rent is payable; for it is not properly in arrear during the continuance of that day, to which the reservation of it relates. Neither can it be made for rent accruing from<sup>b</sup> incorporeal hereditaments, as tithes. Such indeed is not in strictness of legal propriety a rent: nor<sup>c</sup> are there any  
local

<sup>a</sup> 1 Inst. 47. b. 13. ed. n. 6.

<sup>b</sup> Vol. II. 67.

<sup>c</sup> This reason might seem not to extend to a right of *common* demised; but it may well rest on the former general doctrine.

local premises whereon to make the distress.

A landlord, to be intitled to distrain, must have a legal, not merely an equitable, title in the estate. But where<sup>d</sup> a man had leased his land for a long term of years, and subsequent to such lease made a mortgage of it in fee, of which the mortgagee gave notice to the tenant in possession, and afterwards distrained for rent in arrear, the legality of the distress by such mortgagee was the question, and the court held, that he might distrain. For the st. 4 A. c. 16. § 9. takes away the necessity of *attornment*; so that the complete legal title is in the mortgagee from the time of the mortgage. The tenant incurs no damage, which is provided against by the statute, making good all payments of rent by him to a grantor before notice of the grant. But we may infer from

trine. The reason assigned for this point of law, as to commons, in 2 Bac. abr. 106, is not a very clear one, nor is it explained by the references cited.

<sup>d</sup> Dougl. 279 &c. — In this case, the late practice of permitting a mortgagee to proceed by ejectment, if he have given notice to the tenant, that he does not intend to disturb his possession, but only requires the rent to be paid to him, and not to the mortgagor, was admitted to be intangled with difficulties. I have made a question, ant. 45 n, whether that practice is any longer in force.

the

the principles advanced in this case, that tho a mortgagor, by the acquiescence of the mortgagee, continue to receive the rent, and tho the tenant be indemnified, still such mortgagor, having parted with the legal title, is no longer intitled to distrain for it.

I shall not mention the several restraints, which subsisted at common law on distresses for rent; because they are, with an admirable clearness and conciseness, expounded by sir William Blackstone\*, together with the statutes, which remedied those defects. I must partly refer also to the same author for the doctrine of what things might at common law, and may now by statute, be distrained for rent, and of the manner, in which the things distrained may be impounded. Among the things privileged and exempted from being distrained are utensils in trade, as for example, the anvil in a smith's shop; because, as sir William Blackstone expresses it, the taking of them away would disable the owner from serving the commonwealth in his station. But† some have been reminded on this occasion of the Mosaical‡ precept, "no man shall

\* Comm. b. iii. c. 1.

† Noy 181.

‡ Deut. xxiv. 6.

take the nether or the upper millstone to pledge, for he taketh a man's life to pledge," or that whereby he gets his living.

The latitude indulged by the statutes above alluded to is very beneficial to landlords, having made distresses for rent an easy and effectual remedy, which before was dilatory, dangerous and circumscribed. Among other advantages, a considerable one is the power given to distrainers to sell the thing distrained for rent, which they had not authority to do by the common law. But now by the st. 2 W. & M. sess. 1. c. 5, where any goods shall be distrained for rent, and the tenant or owner thereof shall not, within five days after such distress and notice thereof, left at the mansion or other notorious place on the premises charged with the rent, regularly replevy the same, in such case the distrainer, with the assistance of the sheriff, undersheriff, or constable, may cause the goods distrained to be appraised, and may afterwards sell such goods for the best price, that can be gotten for the same, and having deducted the rent and charges may leave the overplus, if any, in the hands of the officer attending, for the owner's use. In the construction of this statute

tute, it has been adjudged, that <sup>h</sup> notice may be given either to the tenant or owner in person, as well as left on the premises: and that <sup>i</sup>, if the goods are sold at the price appraised at, that shall be intended the best price, unless the contrary appears, because the appraisers are sworn. It seems also, that <sup>k</sup> they may be sold at a price lower than they happen to be appraised at; and that the distrainer is not bound to wait an unreasonable time in order to obtain such appraised value. A <sup>l</sup> liberal interpretation too has been given to the requisition concerning the presence of the proper peace officer, for that was designed as a benefit to the landlord. Before <sup>m</sup> any steps are taken in pursuance of this statute, the sheriff's office should be searched to see, whether any replevin is entered within the five days, which time must be computed from the notice, and not from making the distress.

In the st. 11 G. II. c. 19, tho' professedly made for securing the payment of rents, and preventing frauds by tenants, there is one

<sup>h</sup> 1 Sal. 247. Lord Raym. 54.

<sup>i</sup> Lord Raym. 55.

<sup>k</sup> 9 Vin. abr. 129.

<sup>l</sup> 4 Mod. 390. 395.

<sup>m</sup> 9 Vin. abr. 129.—The passages above referred to in Vin. abr. are comments of sir Bartholomew Shower on this statute of king William.

clause much for the benefit of the lessee, viz. the requisition, that he shall within a week have notice of a distress made, and of the place, where the things taken are deposited, and that, upon tender of the rent and charges, any distress made of corn or other product shall cease, and the possession thereof be restored to such former proprietor.

It may be collected from the statute for the sale of distresses, and was always the general rule, that the property of third persons, as well as of the tenant himself, may be distrained by the landlord for rent in arrear, when found on the demised premises. The<sup>n</sup> excepted cases of things privileged from such power of distress, are referred to a necessary regard to the conveniencies of trade and commerce.

II. A second, and also frequent, occasion of seeking expeditious justice by distress, allowed by the law, is where cattle are found *damage feasant*, doing damage on the land of another. So any other chattel<sup>o</sup>, wrongfully placed on

<sup>n</sup> See 1 Inst. 47. a. & n. 14. (13 ed.) Burr. 1498 &c.

<sup>o</sup> Latch 8.—But tho such things, as turves, on another's soil, may be distrained, it is not allowable to burn or destroy them. (T. Jon. 193.)

another's soil, as stacks of corn, or the like, are considered as damage feasant and distrainable. Thus <sup>p</sup> the cattle of a stranger may be distrained by a commoner, for trespassing where his right of common lies, whereby he could not enjoy it in so ample a manner, as he was intitled to. So also where <sup>q</sup> the beasts to be depastured in any common are numerically ascertained, all that exceed that number may be distrained damage feasant. The like <sup>r</sup> remedy by distress is allowed, where men come to fish in my several piscary, their nets and oars may be taken and detained damage feasant. The same <sup>s</sup> course may be pursued, if cattle be put into another's close, tho without the consent or privity of the owner of the beasts. But if <sup>t</sup> a man come to distrain, and see the beasts upon his soil, and the owner chase them out to prevent their being taken, the tenant of the land cannot then follow and distrain them, and if he do, they may be rescued; for the cattle, in order to

<sup>p</sup> 3 Lev. 104.

<sup>q</sup> Yearb. 46 E. III. 12. b.—Tho the number is not in terms ascertained, it must be proportioned to the tenement, in respect whereof such right is insisted on; (vol. II. 77, 78.) but in such case the distrainer acts at some peril.

<sup>r</sup> 3 Cro. 228.

<sup>s</sup> 1 R. A. 665.

<sup>t</sup> 1 Inst. 161. 2.

be distrainable, must be damage feasant at the time of the distress. It is farther to be observed, that <sup>u</sup> distresses of cattle damage feasant may be taken in the night.

III. Distress is incident to <sup>x</sup> fealty. For <sup>y</sup> every kind therefore of service, the lord of the feignory may distrain. Of these services the most considerable, at least in these our days, is that of attendance at the lord's court. If then <sup>z</sup> the jury of the leet present, that any inhabitant within the manor, owing suit and service at that court, hath neglected to appear there, the steward may amerce him for such default. This amercement is to be reduced to a definite sum; and thus being rendered certain, the goods of the defaulter may be distrained for it in any place within the jurisdiction, except lands in the possession of the crown. But for <sup>a</sup> an amercement in a court baron, the lord cannot distrain without prescription. Wherever <sup>b</sup> also the duty depends

<sup>u</sup> 1 Inst. 142. a.<sup>x</sup> Vol. II. 32.<sup>y</sup> 1 Inst. 150. b. Doctor & stud. b. ii. c. 9.<sup>z</sup> 1 R. A. 670.<sup>a</sup> 1 R. A. 666.<sup>b</sup> T. Raym. 204. 1 Cro. 748. 12 Mod. 329. Lord Raym. 71. Skin. 636.

upon special and local custom, there must be a like custom to distrain for it: more<sup>c</sup> especially is this necessary, where it is for the private benefit of a subject. It seems<sup>d</sup>, the bailiff of a manor cannot distrain in these cases by virtue of his office, but that he must have a precept or warrant from the steward of the court. Amercements being in the nature of punishment for a personal offence, the<sup>e</sup> goods of a stranger, tho found on the delinquent's premises, cannot in these cases be taken, as they may for rent. As to what is to be done with the things distrained for fines or amerancements, that is, whether they may be sold, I apprehend, the<sup>f</sup> books are to be understood thus: that for fines or amerancements for offences properly presentable in the leet, as nufances, and in which the public have some concern, the distress may be sold to levy the penalty; for it is the king's court and of record: but that where the duty is of a private nature, whether it appertains to the court leet or baron, there is no authority to

<sup>c</sup> 2 Hawk. 60.      <sup>d</sup> 3 Mod. 138. See 1. Sho. 62. Carth.  
74. 75. Mo. 573. 4. 1 Sal. 108.      <sup>e</sup> 1 R. A. 669.  
Ow. 146. F. N. B. 229.      <sup>f</sup> 2 Hawk. 60. Noy 17.  
8 Co. 41. a. b. 12 Mod. 330. 2 Sal. 379. Bul. 52. Jenk.  
219.

sell, but the distress is in nature of a pledge merely; as that for rent was at common law, and before the passing of the abovementioned statute relating to that subject.

IV. The last occasion, which I shall mention, of distraining, is in order to levy a forfeiture incurred by a particular statute. It is a very common provision in acts of parliament, that the penalties therein specified shall be levied by distress: in which case it seems to have been a general rule, that<sup>s</sup> the things taken might be sold; for the public being concerned, such laws shall have the most effectual construction. This kind of distress can never be taken without a warrant for that purpose. And now by a general<sup>h</sup> law it is provided, "that in all cases where any justice or justices of the peace is, or are, or shall be, required, or impowered, by any act or acts of parliament then in force, or thereafter to be made, to issue a warrant of distress, for the levying of any penalty inflicted, or any sum of money directed to be paid, by or in consequence of such act or acts, it should

<sup>s</sup> 2 Sal. 379. T. Jon. 25.

<sup>h</sup> St. 27 G. II. c. 20.

be lawful for the justice or justices granting such warrant, therein to order and direct the goods and chattels, so to be distrained, *to be sold and disposed of* within a certain time to be limited in such warrant, so as such time be not less than four days, nor more than eight days, unless the penalty or sum of money, for which such distress should be made, together with the reasonable charges of taking and keeping such distress, be sooner paid."

Having taken this view of the several kinds of distress, and on what the legality thereof in general depends, I recur to the action of replevin, the usual mode of contesting that legality.

When by the sheriff's intervention the goods have been delivered back to the claimant, he, in compliance with the condition of his bond, sues this action; which is often instituted in the county court, and from thence removed into one of the superior courts at Westminster. It may be brought<sup>i</sup> by him, who has either an absolute or qualified property in the things taken; and<sup>k</sup> against him,

<sup>i</sup> 1 Inst. 145. b.

<sup>k</sup> 2 R. A. 431.

who

who took or commanded the taking, or against both. And it may be maintained<sup>1</sup> against the sheriff by his proper name, if he were the person, who took them. The declaration states, that the defendant took the goods, specifying the place where, and wrongfully detained them against sureties and pledges; that is, enforced the occasional redemption of them by the replevin bond. The general issue in this action is *non cepit*, that the defendant did not take the goods; but this is rarely pleaded. The defendant may also plead<sup>m</sup> *cepit in alio loco*, that he took the goods elsewhere, and not in the place mentioned in the declaration, which is considered as a plea in abatement. For the place is in general of the<sup>n</sup> essence of the action; and<sup>o</sup> it is put into the count to give the defendant notice, to what he must make his title. But tho<sup>p</sup> the defendant should succeed in his plea of *cepit in alio loco*, yet this is but matter of excuse; he cannot hereupon have a *return* or re-delivery of the cattle or goods, which he has distrained, according to the plaintiff's stipulation in his replevin bond. In order to

<sup>1</sup> Reg. 81. b.<sup>m</sup> 6 Mod. 102.<sup>n</sup> See Str. 507, 8.<sup>o</sup> 1 Cro. 896.<sup>p</sup> 6 Mod. 102, 3.<sup>1</sup> Sal. 93. 94.

obtain that end, the usual course is to shew the reason of making the distress, the title and authority, under which he acted, as for *rent in arrear*, or that the cattle distrained were *damage feasant*, where he had a right of common, or the like. If this defence be made in his own right, as for rent of his own estate, it is called an *avowry*; if in the right of another, and by derivative authority and command, it is termed a *cognizance*. The defendant in this action, so avowing or making cognizance, becomes an actor as well as the plaintiff, and seeks not merely a discharge from the suit, but makes a claim also for farther redress. For as, if the plaintiff succeed, the judgment is, that he recover damages for the taking and detention of his goods, so if the event be favorable to the defendant, and the avowry be for any rent, custom or service, *he* may, by a <sup>a</sup> statute of Henry the eighth, intitle himself to damages; as he may also, by a later <sup>r</sup> act, after judgment on demurrer. The same benefit is introduced, by another statute <sup>s</sup>, in case of avowries for damage feasant. In what other instances, not men-

<sup>a</sup> 7 H. VIII. c. 4.

<sup>r</sup> St. 17 C. II. c. 7.

<sup>s</sup> 21 H. VIII. c. 19.

tioned in any act of parliament, the defendant in replevin shall recover damages, seems to have admitted of<sup>t</sup> some uncertainty, or contrariety of opinion. The reasonableness of such claim may be thought nearly equal in every species of avowry and cognizance.— In avowries for rent, it was necessary by the common law particularly to set forth the whole title. But now by a<sup>u</sup> statute of the last reign an easier method is introduced, it being made lawful for all defendants in replevin to avow or make cognizance *generally*, that the plaintiff, or other tenant of the lands and tenements, whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent, during the time, wherein the rent distrained for incurred, or other service became due, which rent or other service was then and still remains due, without farther setting forth the grant, tenure, demise, or title; and if the defendant prevail, he shall recover double costs of suit. But in other instances, in general, it is necessary for the avowant to shew in every particular a complete title to distrain. Thus in the case

<sup>t</sup> See W. Jon. 421. 434. 1 Bac. abr. 522, 3.

<sup>u</sup> 11 G. II. c. 11. § 22.

<sup>x</sup> of an amercement distrained for, it is not sufficient to say, that the plaintiff was presented for such an offence, but it must be averred, that the fact was committed. I have before said, that amercements must be reduced to a definite sum, which, it seems<sup>y</sup>, may be either by sworn suitors of the court, called *affeerors*, after the jury have found the fact, or by the jury without farther process. But I apprehend, it is more common and regular, that the amercement should be affeered. This is to be stated, according as the fact is, in every cognizance or avowry. The<sup>z</sup> reason, why the avowant is to make out so full a right, is because he is an actor, and is to recover something more than a discharge from the suit; which object must be attained on evincing the merits of his case. For either party may eventually be intitled to costs, as well as damages, according in whose favor the issues are found: and if<sup>a</sup> some be found on each side, and the judge do not certify that the plaintiff had probable ground for pleading

<sup>x</sup> Fitzgib. 109; except as to the bailiff; for with regard to him, the presentment alone is a reasonable vindication. (1 Cro. 748.)

<sup>y</sup> 3 Lev. 109. Keil. 66. a. Fitzgib. 109.

<sup>a</sup> 1 Sal. 108,

<sup>z</sup> 2 Durnf. & East 235, 6, 7.

those

those matters, in regard to which any issue or issues are found for the defendant, the latter is intitled to have the costs in respect thereof deducted out of the general costs of the verdict. For these reasons the defendant may make up the record, and bring the cause on to trial; and <sup>b</sup> therefore also there can be no judgment of nonsuit in this action,

Tho an avowry is the *usual* method of obtaining a *return* of the things distrained, that end <sup>c</sup> may also be answered by *directly pleading in bar*, that the *property* of the goods is in the defendant, and not in the plaintiff. It is <sup>d</sup> said also, that the defendant shall have a return, where he prevails in a plea of property alleged in a stranger; because he had the possession, which was illegally taken from him by the replevin, when the plaintiff had no right.

The pleadings on record in replevin, like those in trespass, frequently run out to great prolixity. Thus to an avowry, that cattle were taken damage feasant, the plaintiff may

<sup>b</sup> 3 Durnf. & East 661.

<sup>c</sup> 6 Mod. 103.

<sup>d</sup> 1 Sal. 94. 2 Lev. 92. See 6 Mod. 103. 1 Sho. 401. Carth. 243, 4.

plead

plead in bar a right of common, or a title to the premises, to which the defendant may reply, as in trespass, and as will be shewn in the next lecture; and so in other cases, till the issues are properly joined. For the statute<sup>c</sup>, which allows defendants to plead as many pleas as they shall be advised, by leave of the court first obtained, (that is, by a *motion of course*) comprehends avowries; and also authorises plaintiffs in replevin, in the same manner, to put in several pleas in bar to each avowry.

We have before seen, that either party in replevin may (at least in most cases) be eventually intitled to damages. If<sup>f</sup> the defendant obtain judgment, he is also to have a return of the things distrained *irreplevisable*. But<sup>g</sup> if return irreplevisable *be* awarded, the former owner of the cattle or other goods distrained may come to the defendant, and offer the ar-

<sup>c</sup> 4 A. c. 16.

<sup>f</sup> 2 R. A. 434.—This judgment *pro retorno habendo* is in such case the regular one; and where it has been mistakenly omitted, the court have given leave to amend, on payment of costs, even after writ of error brought. (3 Durnf. & East 349 &c.)

<sup>g</sup> 2 Inst. 107. 341. Lord Raym. 720.

rearages,

rearages, and if the defendant refuse to deliver the distress, the plaintiff may have an action of detinue, and by that means recover it; for it is but in the nature of a gage.

Thus I have attempted to illustrate some of the most observable points in this action of replevin; the whole doctrine of which abounds with technical and uncouth terms; and it would be difficult to be more particular with any degree of conciseness and perspicuity.

There are two other forms of suit, incident to distresses, *recaption*, and *rescous or rescue*.

1. Where<sup>b</sup> a man distrains for rent, service, or other due, and afterwards, pending the plea, distrains again for the same cause, a writ of *recaption* lies. In this<sup>i</sup> case the defendant cannot avow, but he may justify as in trespass; and the chief measure of the damages is his contemptuous abuse of the remedies provided by the law. This form of suit is fallen almost intirely into disuse and oblivion.

<sup>b</sup> F. N. B. 164.

<sup>i</sup> 1 R. A. 320.

2. Where

2. Where <sup>k</sup> a distrefs is rescued out of the possession of the distrainer, before the impounding thereof, (but which <sup>l</sup> is however considered as being in some degree in the custody of the law) the distrainer so injured may have a writ of *rescous*. Sir Edward Coke <sup>m</sup> on this subject makes his familiar distinction, telling us, there is a rescue in deed, and a rescue in law. The former is a positive act of forcible injustice. A rescue in law is when a man hath taken a distrefs, and the cattle distrained, as he is driving them to the pound, voluntarily escape into the premises of their owner, who is hitherto supposed to be passive; here then a demand is necessary to constitute this a rescue; and if the owner deliver them not on such demand, it legally amounts to that species of injury.

But <sup>n</sup> an action of rescue is not maintainable where the distrefs was unlawful, as if no rent were arrear, or what was due had been tendered, or the goods were taken in the highway, where such taking would be unjustifi-

<sup>k</sup> F. N. B. 230. 6 Mod. 216. <sup>l</sup> 3 Black. comm. 146.

<sup>m</sup> 1 Inst. 161. a.

<sup>n</sup> 1 Inst. 160. b. 161. a.

able, or were not distrainable. If however\* goods *be causelessly* distrained, it is not warrantable in a *stranger* to make rescue. ||

If the goods distrained were actually<sup>p</sup> impounded, the injury is remediable by a writ *de parco fracto*, or of *pound breach*. But there is a great distinction to be made between this process and that of rescue. For if a distress *be* tortious, the party cannot justify a breach of the pound to retake it, tho he may rescue the cattle distrained, *before* they are impounded. Therefore<sup>q</sup> in a *parco fracto*, where the plaintiff shewed no title of making the distress, yet he obtained judgment.

It is very justly provided by act<sup>r</sup> of parliament, that upon any pound breach or rescous of goods or chattels distrained for rent, the persons aggrieved thereby shall, in a special action upon the case for the wrong thereby sustained, recover treble damages and costs of suit against the offenders in any such rescous or pound breach. It has been<sup>r</sup> determined, in construing this statute, that the costs should

\* 1 R. A. 673.

<sup>p</sup> F. N. B. 228.

<sup>q</sup> Lord Raym. 104, 5. 1 Sal. 247.

<sup>r</sup> St. 2 W. & M. sess. 1. c. 5.

\* Carth. 321.

be trebled as well as the damages. It is necessary in the declaration in this case to shew a demise, and distress for rent, as well as the rescous. The fact is laid to be done *vi et armis*; and from its affinity with the action of replevin, I chose to mention it in this place, tho it is reducible to the last head of actions on the case, viz. those founded on some act of parliament.

An<sup>t</sup> action of rescous is also maintainable, where *a man*, lawfully arrested, is wrongfully rescued and set at large: and it seems<sup>u</sup> to lie, tho the process was erroneous; as if a *capias* be sued without an original writ. The party<sup>x</sup> rescued may be a witness for the defendant: and it must be proved to have been a legal arrest, otherwise there can be no actionable rescue. This form of suit is also very uncommon; tho the occasions of it might perhaps not unfrequently occur in a tumultuous and uncivilised age.

In all actions of rescous, the declaration states the injury complained of to have been

<sup>t</sup> F. N. B. 232.

<sup>u</sup> Dal. 1.

<sup>x</sup> 6 Mod. 211.

committed

committed "with force and arms." These words, tho omitted in replevin, are constantly used in actions of trespass, which is the only kind of personal suit remaining to be treated of, and will be considered in the next lecture.

## LECTURE LI.

*Of actions of trespass.*

THE next and last personal action to be treated of is that of trespass *vi et armis*, as it is called, for it universally includes the idea of force, real or implied. The wrong committed, for which a satisfaction in damages is thus sought, may affect the *person* of the plaintiff, his *real property*, or his *goods*. This action therefore is of three kinds, of which I shall speak distinctly; tho any of them may be united in the same declaration, and even be joined in the same count.

I. The injuries to the plaintiff's *person*, for which an action of trespass may be sued, are *assault*, *battery*, *mayhem*, and *imprisonment*.

An *assault* is an attempt or offer with force and violence to do a corporal hurt to another.

This inchoate outrage will not, it seems, support the <sup>b</sup> action we are treating of, unless it be attended with an actual, or what amounts to a constructive, *battery*<sup>c</sup>, for the term “battery” legally includes every injury done to the person of a man, in an angry, or revengeful, or rude, or insolent manner. It has also been <sup>d</sup> adjudged, that where the hurt was accidental, as of one, who stood by to see another uncock his gun, and was wounded by its going off, this action might be maintained.—The Roman civil law had the following restraint<sup>e</sup>; “*si quis per jocum percutiat, aut dum certat, injuriarum non tenetur.*” But with us, it seems, an <sup>f</sup> agreement to fight would not avail the defendant, such fighting being unlawful, and meriting discouragement. The battery and *wounding* may be very considerable without amounting to the legal idea of *mayhem*; which is defined<sup>g</sup> to be such a hurt of any part of a man’s body, whereby he is rendered less able, in fighting, either to defend himself, or annoy his adversary. But whatever degree of

<sup>b</sup> But serjeant Hawkins says, (1 Hawk. 134.) that on an *indictment* the defendant may be found guilty of the assault, and acquitted of the battery.

<sup>c</sup> Ibid.

<sup>d</sup> Str. 596.

<sup>e</sup> Dig. l. xlvii. t. 10. le. 3. § 3.

<sup>f</sup> Bull. nisi prius 16.

<sup>g</sup> 1 Hawk. 111.

violence be used, the complaint is constantly recited with sufficient circumstances of aggravation: and those, who were unapprised of this practice, might be a little surpris'd to find a slight injury proved at the trial, when the declaration had stated, that the assault was made with swords, sticks and staves, and that the life of the plaintiff was greatly despaired of. Lastly, *imprisonment* includes battery, that is, no other or farther battery need be proved. False, unwarrantable, or actionable imprisonment is any detention of another's person, without an authority both lawful in itself, and lawfully executed. This<sup>a</sup> action therefore may be brought against a justice of peace, who maliciously and causelessly grants a warrant to arrest the plaintiff for a supposed crime, without any information. The imprisonment here proceeds *immediately* from the justice: the constable is bound to execute the warrant. If however there be an information laid, in consequence of which the imprisonment is occasioned, an action on the case is the proper remedy.

But besides injuries to the plaintiff's own

<sup>a</sup> 2 Durnf. & East 231.

person,

person, a man may sometimes sue for damages on the ground of injurious violence offered to the persons of others. Thus a master or father may maintain an action for the battery of his servant or child. But then the declaration must allege a *per quod servitium amisit*, that is, that the plaintiff lost the benefit of the service of the child or servant so beaten. This<sup>1</sup> form of action was adopted in a case, where the complaint was for seducing the plaintiff's daughter, *per quod servitium amisit*. She however was twenty-three years of age, and lived in service, absent from her father: but being discharged on account of her pregnancy was received and maintained by the plaintiff. The matter was compromised; but the opinion of the court seemed clear, that the action would not lie. If indeed the daughter had been of more tender years, and had lived with her father, he might have recovered a compensation, for the loss of her service, to which he would then have been intitled, or,<sup>k</sup> whatever had been her age,  
if

<sup>1</sup> Burr. 1878 &c.

<sup>k</sup> 3 Will. 18, 19. Vol. I. 452. n. & 2 Durnf. & East 166 &c. there cited: in which case it is said, that an action merely for debauching a man's daughter, by which he loses her service, is an  
action

if she had lived with him, and acts of service had been proved. The same form of action is in use against an adulterer for criminal conversation with the plaintiff's wife; and<sup>1</sup> force and violence are in law supposed to accompany that atrocious injury to a husband; for in respect to him, her consent is as nothing. It was, I apprehend, on the like principle formerly laid down, that the <sup>m</sup> husband's consent, as being to the commission of an unlawful action, was not available as a justification; and the defendant could not plead in bar, that the fact was by the plaintiff's *licence*: tho it might be given in evidence in mitigation of damages. But it seems now thought, that<sup>n</sup> the husband's privity will defeat the action, tho I have not found it said to be pleadable. When no adulterous intercourse hath been perpetrated or attempted, but a real battery

action on the case; but that according to lord C. J. Holt's opinion, where the offence is accompanied with an illegal entry of the father's house, he has his election either to bring trespass or case. However in lord Raym. 1032, (the authority referred to) the distinctions taken seem to be, not between trespass and case, but different forms of trespass and assault. In 3 Will. 18, 19, it was trespass, and no entry of the house. Trespass lies for enticing away a servant from his master's actual service. (Cowp. 54 &c.) It is also the proper form in actions of adultery.

<sup>1</sup> 7 Mod. 81. 2 Sal. 552.

<sup>m</sup> 12 Mod. 232.

<sup>n</sup> Bull. nisi prius 27. 2 Durnf. & East 166. & n.

committed on a married woman, it is proper, that the husband and wife seek redress by a \* joint action.—Such are the wrongs, which may be prosecuted in actions of assault.

We are next to consider the several kinds of defence, which, besides the general issue of “not guilty,” may be pleaded to this action. First, the defendant may plead that “he is not guilty within four years,” next preceding his being sued; which † is the time prescribed by the statute of limitation for bringing actions of assault. Of other defences the most frequent is that of *son assault demesne*, alleging that the plaintiff made the first assault, either on the defendant himself, or on his wife, father, son, master, or servant. This ‡ cannot be given in evidence on the general issue in an action, tho it may on an indictment, for an assault. Such † avowal of using force, and more especially such interposition on behalf of others, must be designed with a view of preventing future mischief, not in revenge

\* For such action is maintainable, independent of any special damage, referred to the husband separately. (See lord Raym. 1032.)

† St. 21 J. I. c. 16.

‡ 1 Hawk. 134.

§ Str. 953, 4. 2 Sal. 642.

for an assault, that is over, or an injury, that is past. Divers other justifications come under the term, "*molliter manus imposuit*;" that is, that the fact charged upon the defendant was no more than his gently laying of his hands on the plaintiff, to effect some purpose required by the law, or to prevent some ill, generally unlawful, or particularly injurious to such defendant. Thus if the defendant plead an arrest by virtue of legal process, in order that this plea may justify the battery, (supposing it to be something more than a constructive one) as well as the assault, he must shew resistance in the person arrested, or an attempt to escape. But a *molliter manus imposuit* will include the battery, where the cause is sufficient; for to lay hands on another against his will amounts to the legal idea of battery. This justification therefore may be used, where the plaintiff has continued in the defendant's house against his inclination and remonstrances, and was therefore forcibly removed to prevent farther molestation, which amotion is the only cause of action. Such indeed will not be a defence for wounding the plaintiff; for then it is by no means true,

\* Rep. B. R. Hardw. 300.

\* See Skin. 387.

that the defendant gently laid his hands upon him. Certain domestic and other relations also may afford grounds of justification. For the defendant may plead, that the plaintiff was his servant or apprentice, and that for some transgression he sustained the battery complained of as a due and moderate correction: or that he was a soldier or mariner, and the pretended injury was a punishment inflicted by sentence of a court martial, or of the commanding officer on board.

Lastly, common reason teaches us, that "inevitable necessity must justify every act: *quod necessitas cogit, defendit*. But then it must be shewn to be inevitable; and no negligence or inadvertence must be imputable to the defendant. What is pleadable in bar must so far excuse as to leave the defendant faultless. Matters of extenuation can only mitigate the damages, and not intitle him to a verdict in his favor.—Neither \* is it any plea, that the defendant hath been convicted on an indictment for the same assault, and paid a fine to the king. For this suit is instituted for the private redress of the party injured.

\* 2 R. A. 548. 12 Ray. 423. Hob. 134.

\* Bull. nisi prius 16.

Where the damages recovered have been thought inadequate, the court formerly would increase them upon view. This<sup>y</sup> however could not be done, when the declaration did not mention any mayhem, nor describe the manner of the battery, and such battery had not been certified by the judge, who tried the cause. The practice is now very unfrequent, if not wholly obsolete.

II. The second species of trespass *vi et armis* is that affecting *real property*, called trespass *quare clausum fregit*, because the writ requires the defendant to account, "wherefore he broke and entered the plaintiff's close," that is, any land, of which he has the present possession, however low and transitory his interest therein may be. It may be brought against the<sup>z</sup> lessor himself; it may be maintained by him, who has<sup>a</sup> aliened the land, of which he was actually possessed at the time of the injury committed; and by him, who<sup>b</sup> was only in the enjoyment of the vesture of land, or<sup>c</sup> other right, as that of digging and

<sup>y</sup> Har. 408. 1 Sid. 108. 1 Will. 5, 6.

<sup>z</sup> See 2 Inst. 105.

<sup>a</sup> 2 R. A. 569.

<sup>b</sup> 1 Inst. 4. b.

<sup>c</sup> Burr. 1824 &c.

carrying

carrying away turf and peat, provided it be a separate and exclusive interest. So where<sup>d</sup> a certain number of acres, parcel of a large meadow, were yearly allotted to the lord of the manor, it was adjudged, that he might support this action: which principle may be applied to cases analogous. But <sup>e</sup>*quare clausum fregit* is not maintainable by an heir for land descended to him, before he has made his entry, (tho<sup>f</sup> he may make leases of such land) nor by one intitled merely to a right of common, nor by a reversioner for any detriment done to his inheritance.

The chief and most common damage, as stated in the declaration, is done by cattle in treading down and depasturing the grass; for which the owner is liable to answer, if he drive them on the close, or if they escape thither through the defect of fences, which he is bound to repair: in either of these cases he may properly be made a defendant in this action. But other injuries, as digging in the plaintiff's soil, making a road over it, inclosing part of his land with the contiguous land of the defendant, laying open his grounds to

<sup>d</sup> 1 Cro. 421, 2.<sup>e</sup> Ibid.<sup>f</sup> Plow. 142.

those

those adjacent, and the like, and sometimes *consequential* damages, are set forth in the declaration. However, the tort itself, which is the ground of the action, must be directly and immediately injurious to the plaintiff's property and possession; otherwise, according to a distinction firmly established, not trespass, but an action upon the case, is the proper remedy. Such <sup>s</sup> action upon the case was brought for damaging a colliery of the plaintiff, who obtained a verdict, and had an intire judgment on the three counts in the declaration. It was objected, that two of the counts described a trespass *vi et armis*; for in them it was alleged, that the defendant caused great quantities of water to be conveyed through divers other collieries into that of the plaintiff: and that a count in trespass cannot be joined in the same declaration with a count in an action upon the case. The court overruled the objection, saying, "that the plaintiff in his declaration described a fact, which might, at the trial, be proved to be either proper for an action of trespass, or on the case, according to the evidence. And it appears, that it was here proved at the trial to

<sup>s</sup> Burr. 1113, 4.

be the latter. If it had been proved to be trespass *vi et armis*, the plaintiff must in that event have been nonsuited. Before the trial it stood indifferent, whether it would come out to be the one or the other. However in the nature of the thing it must be a consequential damage; as the act complained of was done on the defendant's own soil." By the words "consequential damage" we must here understand such an act as consequentially only becomes injurious: and must not infer from that sentence, that consequential damages can only be redressed in an action on the case. For where the wrong done is a direct invasion of the plaintiff's property in possession, consequential or remote, as well as the immediate, damage may well be set forth in the declaration in trespass *vi et armis*: as that the defendant entered into the plaintiff's grounds, and destroyed his fences, *by means whereof the cattle of divers strangers escaped thither and consumed the grass.*

It must be observed, that <sup>h</sup>, when land has been recovered in ejectment, this action may be sued in the name of the fictitious lessee, as Thomas Doe, to obtain the mesne or inter-

<sup>h</sup> Burr. 665 &c.

mediate

mediate profits, which the lessor of the nominal plaintiff was deprived of, while he was kept out of possession, and also the costs of the former suit. In this case an action of *assumpsit* for the use and occupation of the premises cannot properly be brought, because that proceeds on the idea of a contract, and states that the defendant occupied such property by the plaintiff's consent. But here the possession manifestly appears to have been adverse: and this action of trespass to recover the mesne profits is therefore the remedy appointed by the law.

It is proper also here to mention, that an action *quare clausum fregit* is the mode of seeking redress, where breaking and entering a close may seem a strange language, I mean, for the injury of fishing in the plaintiff's fishery. The declaration however states, that the defendant broke and entered the plaintiff's close, covered with water, being the soil or bed of a certain river, creek, or the like, (describing the boundaries) and there fished for and took divers quantities of fish, specifying an arbitrary number of different kinds. For a lake, stream, or river are not, as such, demandable in real actions, but as so many  
acres

acres of land covered with water; and in conformity to the same idea this action is framed.

The pleas or justifications in *quare clausum fregit*, besides the general issue of "not guilty," are very numerous. Those first to be considered are such as affect the title to the land; for this action is not an unusual mode of trying the right to estates. First therefore the defendant may plead *the common bar*, as it is called, that is, he may allege the place, in which the trespass is supposed to have been committed, *to be his own soil and freehold*. This is a compendious <sup>i</sup> mode. The defendant may also justify by setting forth his title at large, whether by descent or otherwise, with the several conveyances, under which he claims, provided he can shew a right to the present possession of the land, not a right of entry merely, but such as leaves no possessory interest whatsoever in the plaintiff. Another caution is, that he

<sup>i</sup> It has always appeared to me rather strange; how this form crept in consistently with the strict and rational principles of special pleading, tho I know it is accounted for so early as the 4th of E. VI. (Plowd. 26.) on this ground, that such special matter, as the plaintiff's having a lease for years, shall not be intended.

must

must carry the detail back to the estate of some person seised in fee, and so derive his pretensions. For the rule of pleading is, that the commencement of particular estates (less than fee simple) must be shewn, that is, how they branched out of the complete estate in fee: which gives an opportunity to the plaintiff of contesting any part, any link of the deduced title. A present possessory title may in like manner be set forth in a third person, the defendant alleging, that he acted as his servant and by his command.

Other rights also, besides a claim to the land itself, may furnish grounds for justifying the supposed trespass. Thus the defendant may in pleading intitle himself to a right of common, of way, of fishing, of watering his cattle, of digging turves, (called common of turbary) or of having estovers, in the place mentioned in the declaration. All which claims may properly come in question, and be put into a way of trial in this action, whether they depend on custom, or prescription, or any other foundation. Other customary rights may also form a part of the record in trespass *quare clausum fregit*, and be brought to legal decision; as those of cutting fuel for the poor,  
of

of taking ballast, or of <sup>j</sup> towing barges, on the banks of navigable rivers, of <sup>k</sup> making perambulation, or the like. Sometimes the right, on which the justification is built, is of general extent; as that the place, where the trespass is supposed to have been committed, is a common <sup>l</sup> highway; or if the suit be brought for fishing in the plaintiff's fishery, that such place is an <sup>m</sup> arm of the sea, and free to be fished in by all the king's subjects. Much of the same nature are those justifications, where the fact is alleged to have been done in order to promote the public good, or to abate a public nuisance. On <sup>n</sup> this ground of promoting the common good, and consistently with prior adjudications, the court supported the plea, which justified the following foxes with horses and hounds over the ground of another, as the necessary means of killing

<sup>j</sup> For such right depends solely on the custom, tho a very extensive one, and tho perhaps small evidence of usage would establish it. (3 Durnf. & East 262.) But it does not subsist by the common law, and cannot be pleaded as a general right. (3 Durnf. & East 253.—265.)

<sup>k</sup> Co. ent. 651. b. 652. a. <sup>l</sup> 3 Durnf. & East 265, 6.

<sup>m</sup> A man may have, and may accordingly reply to such general defence, an exclusive and appropriate privilege of fishing even in an arm of the sea. Such right is not to be presumed, but the contrary. It may however be established by prescriptive usage. (Burr. 2162 &c.)

<sup>n</sup> 3 Durnf. & East 259. <sup>1</sup> Durnf. & East 334 &c.

those noisome and destructive animals. If unnecessary or malicious damage, as in trampling the hedges, had been done, it would have been a proper subject for a new assignment. The plea averred, that the defendant *did as little damage as he possibly could*, which is a usual insertion in the several sorts of justifications to actions *quare clausum fregit*. But in the abatement of a public nuisance, injuriously continued by the plaintiff, this perhaps is not required.

Sometimes the defendant pleads, that what he did was by the *licence* and authority of the plaintiff himself. Such licence<sup>p</sup> is determined by the land's changing its owner: nor<sup>q</sup> can it be pleaded as having been given by a servant, tho that circumstance, as shewing the nature as well as occasion of the trespass, might perhaps be considered in mitigation of the damages. Sometimes the defendant justifies his entry, as being with a view to seize or take something to which he, or his employer, is intitled, as tithes regularly set out, or a

<sup>p</sup> 2 Sal. 459.

<sup>q</sup> 6 Mod. 171.—This cannot be given in evidence under the general issue. (2 Durnf. & East 168.)

<sup>r</sup> 1 Cro. 876.

deodand forfeited *and demanded* previously to such supposed trespass, or other chattel. But in these cases, he cannot, I apprehend, warrant the breaking of locks and gates, as he may in claiming a right of way or common.

Lastly, sometimes the question between the parties is, on whom the obligation of repairing the fences, (confessedly out of repair) through the deficiency of which the supposed trespass happened, depends.

In all cases, the plea concludes with a *quæ est eadem*, as it is called, that is, an allegation that the matter justified by the defendant is the same fact, the same supposed trespass, of which the plaintiff hath complained; and if the plaintiff think otherwise, he should set forth a new assignment.

The common or general *replication* to pleas in bar or justifications in trespass is that the defendant did the injury "of his own wrong, and without such cause as by him alleged," in the Norman French, *de son tort demesne*, and still frequently spoken of by the manner, in which it used to be expressed in Latin, *de injuriâ suâ propriâ et absque tali causâ*.

There are however some justifications, to which this general replication is not allowed. First then it cannot be used, where <sup>r</sup> the plea contains matter of record as well as of fact. For *absque tali causâ* goes to the whole; and matters of record are not to be sent to a jury. But <sup>r</sup> if the defendant justify under process of any court not being of record, the plaintiff may reply generally; for then the whole is matter of mere fact. The other <sup>r</sup> cases, in which the general replication is not permitted to be used, are, where the defendant claims to himself any right to or interest in the lands, where he sets up a licence or authority derived mediately or immediately from the plaintiff himself, and where he justifies by a general permission of the law, as for example to view, if waste have been done or suffered. —The pleadings are oftener voluminous and prolix in *quare clausum fregit*, than in any other form of action.

Of the same nature with this suit is that for <sup>u</sup> breaking and entering the plaintiff's

<sup>r</sup> 8 Co. 67. a. 3 Lev. 65.

<sup>r</sup> Doc. plac. 114.

<sup>r</sup> Doc. plac. 114, 5. 8 Co. 67. a. b. See 2 R. A. 568.

<sup>r</sup> See 3 Durnf. & East 297.

dwelling house, or trespass *vi et armis quare domum fregit*. This also is an invasion of what the law considers as *real* property. What has been said of the former, is in great measure applicable to this suit. It seems however in reason to require stronger grounds of justification for entering the plaintiff's dwelling house against his will than his close. On this principle, therefore, of securing persons in the peaceable and quiet enjoyment of their homes, against even the most plausible pretences, the following\* case was determined. The defendant pleaded, "that her daughter was retained a servant in the plaintiff's house, and was very sick there, and she being her mother came to see her in her illness, which is the same trespass complained of." Yet this was holden no good justification without the owner's licence, or at least without its being asked.

It seems, that this is the proper kind of action, where a parson of a parish determines to sue one, who has preached in his church without his leave: for such intruder,

\* 2 R. A. 567.

lord chief justice Holt says<sup>r</sup>, is a trespasser.

A charge of breaking and entering the dwelling house often begins the declaration in trespass against *the goods*, of which I am next to speak.

III. An actionable trespass against *the goods* of another may be committed by taking them away, or by damaging them without the dispossession of the owner. This therefore, as well as replevin, is an usual form of action, when the validity of any distress or seizure whatsoever is intended to be litigated: for to take the goods of another, *without* the color of some authority or excuse, amounts to larceny, and is the subject of a criminal indictment. The numerous injuries, affecting personal property, without dispossessing the owner, but by which it is rendered of less value, may be easily conceived. If such wrong be committed, while the goods can be said to be in the owner's possession, this action lies, as

<sup>r</sup> 12 Mod. 420. 433.

well as where they are taken from him. For the *gist* or essence of the action is the invasion of possession. 'Therefore' if the defendant come to goods by the delivery of the plaintiff, it is not maintainable. It may<sup>a</sup> however be sued by him, who has the possession of goods merely, as if a man have cattle to agist. It may be brought also where the property is sufficiently vested to constitute the idea of possession: as<sup>b</sup> where the tenant of land hath set out tithes, and a stranger takes them away, altho the rector never had the actual, but only the 'imputed, possession. For here the law couples the idea of possession with that of ownership as against him, who had no claim to either; or else considers the possession of the tenant as the possession of the rector; or perhaps, in anomalous cases like the present, the law sustains the action allowed of, whatever it be, from a principle of necessity, as otherwise there would be a right without a remedy, contrary to the maxims of English

<sup>a</sup> 2 R. A. 555.<sup>b</sup> 2 R. A. 551.<sup>c</sup> Vol. II. 110.

<sup>d</sup> A *constructive* possession will intitle the rightful owner to bring trespass in other instances; as a lord of a manor, for an estray or wreck, taken by a stranger, before seizure, by or on behalf of such lord; or an executor before probate. (1 Durnf. & East 480.)

jurisprudence.—An<sup>d</sup> action of trespass lies also for taking, killing, or wounding and lessening in value the plaintiff's dog; for the domestic tameness of that animal makes it a subject of possessory property; and by a<sup>d</sup> statute of the present reign the stealing of dogs is punishable by pecuniary forfeitures to be levied by summary convictions, and by imprisonment for default of payment, but not made felony.

It must be observed, that<sup>r</sup> trespass on the person or goods may be laid in any county, but trespass *quare clausum fregit* is local, and the proper county must be the place of trial.

The kinds of justification in trespass on the goods are pretty obvious, as, particularly, setting forth at large the causes of making any distress or seizure. Sometimes indeed the defendant is relieved from that necessity; several acts of parliament relating to bankrupts, and to the excise and customs, providing that he may plead the general issue, and thereupon

<sup>d</sup> Hob. 283.    <sup>r</sup> Lev. 216.    <sup>3</sup> Durnf. & East 37, 38.

<sup>d</sup> 10 G. III. c. 18.    <sup>r</sup> 3 Cro. 444.    <sup>1</sup> Inst. 282. a.

give the special matter in evidence, without putting it on record.

All actions of trespass, where the nature of the case will admit of it, (not being a single act, as cutting down a tree or the like) may be laid with a *continuando*, charging the defendant with *continuing* his said trespass from one day to another. In this<sup>s</sup> instance, (altho it is not otherwise necessary for the plaintiff to prove the time of committing the trespass, as laid in the declaration; but only that it was before action brought) he must either abandon the *continuando*, or prove the fact within the period specified.

To prevent a multiplicity of frivolous suits, justly esteemed detrimental to the community at large, the legislature has provided<sup>h</sup>, that in all actions of trespass, wherein the judge shall not certify, that an assault and<sup>i</sup> battery was sufficiently proved, or the freehold or title of the land was chiefly in question, the plaintiff, if the jury find the damages under

<sup>s</sup> Bull. nisi prius 85.

<sup>h</sup> St. 22 & 23 C. II. c. 9.

<sup>i</sup> If the judge therefore certify an assault only, the plaintiff will be intitled to no more costs than damages. (3 Durnf. & East 391.)

the

the value of forty shillings, shall not recover or obtain more costs of suit than the damages so found shall amount unto. But in trespass for goods taken away, where by presumption no right of freehold could come in question, if the judge do not certify under a more antient<sup>k</sup> statute, the plaintiff is intitled to full costs: as he may also be in the three following cases; first, by the statute 4 & 5 W. & M. c. 23, where the defendants, being inferior tradesmen, apprentices, and other dissolute persons neglecting their trades and employments, hunt, hawk, fish, or fowl on the plaintiff's land; secondly, by the statute 8 & 9 W. III. c. 11, where the judge certifies the trespass to have been wilful and malicious; and lastly, by the statute 4 A. c. 16, where any special plea is added after the general issue, the plaintiff is intitled to costs at the discretion of the court, unless the judge shall certify in this instance, that the defendant had probable cause to plead such matter. The<sup>l</sup> granting or refusing

<sup>k</sup> A general power of certifying, (for the purpose of diminishing the costs to the amount of the damages recovered, or less) in actions personal, (not concerning lands, nor for any battery) is given by st. 43 El. c. 6. § 2; and a certificate under this act may be granted after the trial of the cause. (3 Durnf. & East 37, 38 & n.)

<sup>l</sup> Bull. nisi prius 324.

of these certificates is considered as discretionary in the judge, according to the circumstances before him. For if he were in all cases bound by the verdict, the above-mentioned provisions would often be frustrated of their intended utility. But<sup>m</sup> a judge, having omitted to certify, cannot afterwards do it, under the statute of Charles the second, out of court. For it is expressly required to be by that law at the trial of the cause.

These seem to be the most obvious and material points respecting actions of trespass *vi et armis*, and sufficient to form an adequate idea of their various use; and the various defences that may be made to them.

Having now considered the several kinds of personal actions, we may call to remembrance, that the issues joined therein may consist of matter of law only, called demurrers, or of fact, either simply, or comprehending also some legal principles. In the former case of demurrers, the doubt is to be cleared by the judges of the law, according to the rules of

<sup>m</sup> 2 Will. 21.

that difficult and important science, on which our attention is employed. But in all issues where facts are to be ascertained, (whether mixed with law or not) *evidence* must be adduced, either *viva voce*, or *in scriptis*; which will be the subjects respectively of the two next lectures.

## LECTURE LII.

*Of parol evidence.*

THE proof of contested facts must in all trials consist either of the oral testimony of competent witnesses, or of such written instruments as are legally admissible in evidence: the former is designed as the subject of the ensuing discourse.

The mode of examination *viva voce* in open court, which is the general usage in causes to be determined by a jury, is celebrated by\* many learned writers as a peculiar excellence of our law. It is justly urged, how much depends on the manner of giving evidence, on applying apt and sudden questions by intelligent judges and advocates, on publicly confronting adverse witnesses, and on the awe and reverence inspired by the dignity of a so-

\* Hob. 325. 3 Black. comm. 373, 4. Pref. to Fort. rep. II.  
lemn

lemn tribunal. These causes have a manifest influence and tendency to confound and detect intentional falsehood, and to expose the most hidden and premeditated perjury. It is therefore a settled rule<sup>b</sup>, that in cases of life, no evidence is to be given against a prisoner but in his presence. On the other hand, in litigations respecting property, some reason may be assigned in support of the practice of those courts, which, following the example of the later civilians, admit and decide by written depositions, taken before commissioners on interrogatories formally prepared. Actions at law are usually brought to, or depend on, a simple and distinct issue. But suits in equity frequently involve a multiplicity of articles, which having their respective proportion of weight, the omission of any of them on the one side might make the adverse scale unduly preponderate. In such case, the very circumstances, which I have mentioned, as obviating the dangers of designed perjury, might amaze or deject an upright, but diffident, witness; who, tho he should happen not to violate the truth, might lose that perfect recollection, necessary to display every particular,

<sup>b</sup> 2 Hawk. 428.

and to represent a complicated tale with clearness and precision. Perhaps therefore we may venture to assert, without meaning to offer a quaint paradox, that the usage of the courts of common law is better calculated to detect falsehood, the practice of the courts of equity (in the case of a well-intentioned witness) to unravel the whole truth: that therefore each method has its different utility, and proper sphere of application.

The first consideration respecting witnesses is *the bringing of them in* to be examined. It is certainly a very reasonable retrenchment of natural liberty, that every citizen should be compellable to appear and give evidence, where it may tend to quiet contested property, to repair private injuries, to vindicate the public justice of the kingdom, or above all to disculpate calumniated innocence. There is therefore established a regular mode to enforce the appearance of witnesses, being a writ specifying a pecuniary penalty for disobedience to its injunctions: and their persons are protected from arrests in civil actions, while they are going to and returning from the courts,

▪ 1 Mod. 66. 1 Vent. 11. Vol. I. 98, 99. & n.

where

where their attendance is required. This seems to have been always the law in suits between private parties. But whether <sup>d</sup>a defendant in capital prosecutions, which are carried on in the king's name, had the power of exacting the attendance of those, on whose testimony he relied, was made a question, till two statutes, in the several reigns of king William and queen Ann, cleared this very important doubt; and it is now settled, that the same compulsory process to bring in witnesses may be used in all cases whatsoever. As a farther security against the backwardness of witnesses, it is provided by <sup>e</sup>a statute of queen Elizabeth, that if any person, served with process to testify, shall not appear, not having a lawful let or impediment to the contrary, he shall forfeit for every such offence ten pounds, and yield such farther recompence to the party aggrieved by his default, as by the discretion of the judge of the court, out of which the process issues, shall be awarded. But the act makes it a previous condition, that such reasonable costs and charges were tendered or <sup>f</sup>promised to the

<sup>d</sup> 2 Hawk. 435.

<sup>e</sup> 5 El. c. 9. § 12.

<sup>f</sup> 3 Cro. 522, 3. 540, 1. March 18.

witness

witness according to his calling, as, having regard to the distance, were necessary to be allowed. It ought moreover to be averred, that damage <sup>s</sup> was actually sustained by the default. In like manner, at the trial, a witness, who appears, may refuse to be examined, unless his expences are reimbursed or secured to his satisfaction; nor is he then bound to answer any question, whereby he <sup>n</sup> might accuse himself of a crime, nor, I apprehend, whereby he might incur any penalty or forfeiture, or impeach the title to his property and possessions. It is also an established rule, that persons educated in the profession of the law are not bound to reveal the secrets of those, who advise with them; for it is contrary to the trust and confidence reposed, and would destroy the safety and benefit of legal counsel. But they may be <sup>i</sup> constrained to declare matters of their own knowledge, which they were acquainted with before the retainer from their client, or which was not communicated to them in the character of counsel, solicitor or attorney.——In such manner and under such terms witnesses are in

<sup>s</sup> 3 Cro. 541. March 19.

<sup>n</sup> 2 Hawk. 433.

<sup>i</sup> 1 Vent. 197. Skin. 404. 4 Durnf. & East. 753 &c.

general brought in, and compellable to be examined.

The next object of inquiry is their *oath*; by which professing their belief in the Deity, and his moral providence, and appealing to his omniscience for the truth of their attestations, they derive a sanction to their credit, from the manifest danger they avowedly incur, if they should be forsworn. This solemnity is required from all ranks. In<sup>k</sup> the beginning of the reign of Charles the first, a question arose, whether a peer of the realm, defendant in chancery, ought to put in his answer upon oath. When it was unanimously resolved by the house of peers, that the nobility of this kingdom and lords of parliament are of antient right to answer in all courts as defendants upon protestation of honor only, and not upon the common oath. The reference was general, whether a peer is to answer upon oath: but the house considered only their answers in courts as defendants. And where<sup>l</sup> a lord of parliament is to give testimony, it has been often ruled, that he must be sworn: otherwise what he speaks is not evidence, nor can he be punished for perjury.

<sup>k</sup> W. Jon. 154, 5.

<sup>l</sup> W. Jon. 153. 3 Cro. 64.

<sup>2</sup> Mod. 99. <sup>2</sup> Sal. 513. <sup>1</sup> Wms. 146.

It is not clear, however, that a peer can be compelled to take the oath; and if not, he might very unjustly deprive a suitor of the benefit of his attestation. If this be law in civil actions, as it is asserted in one <sup>m</sup> book of authority, it seems strongly to demand some remedial alteration. In criminal <sup>n</sup> prosecutions, I presume, the courts would enforce, at the peril of commitment, the attestation of peers, for the just detection of the guilty, and the necessary acquittal of the innocent.

There has been indeed one singular instance of admitting testimony without oath. This <sup>o</sup> was in the reign of James the first, whose certificate, under his sign manual, was received as evidence in a chancery suit without exception. It would have been characteristic of this monarch to exclaim,

*ⁱ Juramenta petis? regem jurare minori  
Turpe reor: nudo jus et reverentia verbo  
Regis inesse solet, quovis juramine major;*

and many of his judges were ready to sacrifice to his vanity with pliant adulation. But the legality of admitting this evidence was <sup>q</sup> justly

<sup>m</sup> 1 Freem. 422.

<sup>n</sup> 1 Sal. 278. 2 Hawk. 152.

<sup>o</sup> Hob. 213.

<sup>p</sup> Gunther. Ligurin. de gestis Frid. i. lib. 3.

<sup>q</sup> 2 R. A. 686.

questioned by a very great contemporary authority. In the second year of Charles the first, the house of lords referred it to the judges, generally, whether, in case of treason and felony, the king's testimony is to be admitted, but the king prohibited them from giving their opinion. As to appearing personally, and being sworn in court, that seems wholly inconsistent with the royal dignity.

In one case our law dispenses with the formal manner of being sworn: but the dispensation consists in words more than in reality. This is in favor of those sectaries, who scruple to take an oath, and whose solemn af-

▪ 7 Parl. Hist. 43.

▪ And therefore, I presume, it was, that the king of Israel was among the persons expressly disqualified, by the laws of the Hebrews, from giving testimony: yet Mr. Selden intimates, that the king of Judah might be a witness, and be witnessed against. Seld. vol. i. p. 1521. 1526. (Wilk. ed.)

▪ St. 7 & 8 W. III. c. 34.—The words to be pronounced were, "I (A. B.) do declare in the presence of Almighty God, the witness of the truth of what I say." But by st. 8 G. I. c. 6. they are changed to the following: viz, "I A. B. do solemnly, sincerely, and truly declare and affirm." It is observable, that when the same indulgence was extended to the Moravians by st. 22 G. II. c. 30, the old form was prescribed. See some historical account of the statute of king William, Cowp. 390, 1.—A very strange, tho immemorial, practice had prevailed not to suffer witnesses for a prisoner in capital cases, in general, to be sworn: (2 Hawk. 434. Cowp. 391.) this is rectified by st. 1 A. st. 2. c. 9.

firmation

firmation is allowed to have the same force and effect. Such solemn<sup>u</sup> asseveration must be looked upon as a reference and appeal to the Supreme Being, in substance and reason therefore as no other than an oath. And if their affirmation be false, as they must be thought to incur the moral guilt of perjury, so they are subjected to the legal punishment of that crime. Such kind of attestation is however confined to civil actions. Out of tenderness to prisoners, the same law which introduced it, forbade it to be used in<sup>x</sup> criminal causes; or that any thing less than the most solemn kind of testimony should draw down the infliction of capital or corporal punishment.

We learn from sir Edward Coke<sup>y</sup>, that a new oath cannot be imposed on any subject without authority of parliament, or the common law time out of mind. In another place<sup>z</sup> he asserts, none can examine witnesses in a new manner without act of parliament. It is true,

<sup>u</sup> Cowp. 390.

<sup>x</sup> An action on a penal statute is not within this exception: in such case a quaker's affirmation is admissible. (Cowp. 382—395.)

<sup>y</sup> 2 Inst. 479.

<sup>z</sup> 2 Inst. 719.

oaths cannot be so required on any new or extrajudicial occasion. But we are not to understand from the cited passages, that the <sup>a</sup> external form, with which the members of our church are usually sworn, is, or ever was, considered by law as essential to an oath, and necessary to affect the conscience of the person taking it, and the belief of those, to whom the testimony is addressed. Forms <sup>b</sup> have been various; and the <sup>c</sup> ceremony of touching the holy scriptures is derived, according to Mr. Selden, from a pagan solemnity resembling it.

In deciding on the question, whether one, who professed the Gentoo religion, could be a witness, one <sup>d</sup> of the learned judges men-

<sup>a</sup> In the time of the fanatical usurpation, when men were studious after religious novelties, and had scruples, which they did not comprehend, the vice-chancellor of Oxford, being a witness, refused to be sworn in the accustomed manner, but he caused the book to be holden open before him, and then raised his right hand. (See Selden vol. i. 1467. Wilk. ed.) The jury referred themselves to the discretion of the court, what force such attestation ought to have. Glyn chief justice replied, that in his opinion the oath was as strong as that of the other witnesses; but if he were to be sworn, he would conform to the accustomed mode; as he had before declared on a similar occasion. (2 Sid. 6.)

<sup>b</sup> 1 Atk. 42.

<sup>c</sup> Seld. vol. i. 1467. (Wilk. ed.)

<sup>d</sup> 1 Atk. 42.

tioned the opinion of archbishop Tillotson, (by the name of a very great divine) that the form of an oath is voluntary, taken up and instituted by men. In the same cause, lord<sup>e</sup> chancellor Hardwicke, after citing the words of bishop Sanderson, "*jurisjuramentum est affirmatio religiosa*," (which is in fact Cicero's<sup>f</sup> definition) added, all that is necessary to an oath is an appeal to the Supreme Being, as thinking him the rewarder of truth, and avenger of falsehood. The principal use of these observations is to shew, that we must not confine the giving of testimony to believers only in the Christian faith. "It is laid down by sir Edward Coke (says sir Matthew<sup>g</sup> Hale) that an infidel is not to be admitted as a witness; the consequence whereof would be, that a Jew, who only owns the old testament, could not be a witness. But I take it, that, altho the regular oath, as it is allowed by the laws of England, is *tactis sacro-sanctis Dei evangeliiis*, which supposes a man to be a christian; yet in cases of necessity, as in foreign contracts between merchant and merchant, which are many times transacted by

<sup>g</sup> 1 Atk. 48.<sup>f</sup> De off. l. iii. c. 29.<sup>g</sup> 2 Hal. H. P. C. 279.

Jewish brokers, the testimony of a Jew *tacto libro legis Mosaicæ* is not to be rejected, and is used, as I have been informed, among all nations. Yea the oaths of idolatrous infidels have been admitted in the municipal laws of many kingdoms, especially *si juraverit per Deum verum creatorem*; and special laws are instituted in Spain, touching the form of the oaths of infidels." Such is the language of that learned and pious judge.—It will not seem strange, that it should not formerly have been clearly settled, whether the testimony of Jews was admissible, if we recollect, that <sup>b</sup> they were banished by Edward the first, and did not return to this kingdom till the time of Cromwell's usurped power. But <sup>i</sup> now their evidence is never excepted to, and they are punishable, like others, for perjury.—As to the case of the Gentoo, his deposition was taken, by virtue of a commission out of chancery to the territories of the Great Mogul, with <sup>j</sup> ceremonies extremely vain and superstitious.

<sup>b</sup> 1 Parl. hist. 95. 1 Atk. 31. 35. Cromwell rejected their proposal for settling here. (20 Parl. hist. 474 &c.)—Before their banishment, they were indulged with the trial *per medietatem linguæ*, and were sworn on the five books of Moses holden in their arms, and by the name of the God of Israel, who is merciful. (Dy. 144. a. marg. ed. 1688.)

<sup>i</sup> 1 Atk. 35.

<sup>j</sup> The deponents being before the commissioners with a Bramin

stitious. But it was certified, that <sup>k</sup> such was the usual and most solemn form among professors of that religion: and <sup>l</sup> the depositions were, after much argument and deliberation, allowed to be read in evidence by the lord chancellor, the two chief justices, and the chief baron, because the Gentooes were understood to believe in the Supreme Being, and the obligation of an oath, which is so necessary for the maintenance of peace and justice among men, depends wholly on the sense and belief of the Deity.

But in the same cause, two <sup>m</sup> of the learned judges expressed themselves clearly of opinion, that a professed *atheist* could not be a witness. Such impious avowal would indeed subject a man to prosecution and punishment both by the common and statute law of England. But it is inconsistent and repugnant to reason to require him to be sworn. The case therefore of men wholly without religion (if any such there be) may justly be thought a reasonable

Bramin or priest of the Gentoo religion, the oath prescribed to be taken was interpreted to each witness respectively; after which they severally touched the foot of the Bramin; and then the Bramin's hand was touched by another priest. (1 Atk. 21.)

<sup>k</sup> 1 Atk. 21.

<sup>l</sup> Ibid. 50.

<sup>m</sup> Ibid. 40, 45.

and legal objection to bearing testimony in any cause or trial whatsoever: and this we may set down as the *first general exclusion* from giving evidence known to our laws.

Another *exception*, also of a *general* nature and *extending to all causes and trials*, arises from *imbecility or defect of understanding*. Such is the case of *infants*: in regard to whom, the law<sup>a</sup> has wisely forborn peremptorily to fix any determinate age, at which their testimony shall be received, on account of the different periods, at which they severally attain to maturity of discretion. A<sup>o</sup> child of nine years has been allowed to give evidence: and the constant course is for the court to interrogate them, and if by their answers they appear sensible of the guilt and danger of perjury, they are to be sworn and examined. But if through the insufficiency of their understanding, the oath cannot be administered, their bare<sup>p</sup> affirmation, at least in criminal cases, is not admissible. A similar kind of disqualification arises from<sup>q</sup> *nonsane memory*. Such as the law esteems *idiots from their birth* are of

<sup>a</sup> 2 Hal. H. P. C. 278.      <sup>o</sup> Ibid. 284. See Str. 700, 1.

<sup>p</sup> 2 Hal. H. P. C. 279. cont. But 1 Atk. 29. and the prevailing opinion acc.

<sup>q</sup> 1 Inst. 6.

necessity under a perpetual exclusion from attesting: but <sup>1</sup> *lunatics* may be examined in their lucid intervals.

The only remaining *exception* against giving evidence, *which extends to all trials indiscriminately*, is, where men are by law deemed *infamous*, or at least arises *propter delictum*. An <sup>a</sup> attainder or conviction of treason, <sup>1</sup> felony, piracy, *præmunire*, or perjury, or of forgery on the <sup>b</sup> statute of Elizabeth, a judgment in attain for giving a false verdict, or in conspiracy at the suit of the king, and also judgment to stand in the pillory, or other stigmatical sentence pronounced for <sup>c</sup> any infamous crime, being in a court, which had jurisdiction, are good causes of exception against a witness, while they continue in force. But <sup>d</sup> no such conviction or judgment can be made use of to this purpose, unless the record be actually produced in court: and <sup>e</sup> it is not sufficient to produce the conviction alone, it must be followed by a judgment to consummate the incapacity.

<sup>1</sup> 2 Hal. H. P. C. 278. Com. Dig. tit. Testmoigne.

<sup>a</sup> 2 Hawk. 432. <sup>1</sup> See post 286 & n. <sup>b</sup> 5 Eliz. c. 14.

<sup>c</sup> 5 Mod. 15, 16. 74, 75. <sup>3</sup> Lev. 426, 7. <sup>1</sup> Lord Raym. 39, 40. <sup>2</sup> Wilk. 18, 19. <sup>1</sup> 2 Hawk. 433. <sup>2</sup> Cowp. 3.

The king's <sup>a</sup> pardon will restore the party to his credit after a conviction or attainder for treason or felony, *a fortiori* therefore in lesser crimes; for it takes away not only the punishment, but, humanly speaking, the <sup>b</sup> imputation of guilt and turpitude.<sup>c</sup> To this effect <sup>e</sup> it was holden by lord chief justice Holt, that the king's pardon will remove a man's disability to be a witness in all cases, wherein it is only the consequence of the conviction or judgment against him, and not an express part of the judgment entered, as it is in conspiracy at the suit of the king, and in perjury on the <sup>d</sup> statute, viz. *quod in posterum non sit receptus ut testis*. But if the <sup>e</sup> perjury were prosecuted according to the course of the common law, it seems a pardon would restore the competency, leaving however the credibility very open to observation.

Accomplices <sup>f</sup>, and those, who have confessed themselves guilty of the same crime, which they lay to another's charge, are admissible witnesses, provided they are not convicted, nor joined in the same indictment. So

<sup>a</sup> 2 Hawk. 433.

<sup>b</sup> Hob. 81, 82. 1 Vent. 349. T. Raym. 369.

<sup>c</sup> 2 Sal. 689.

<sup>d</sup> 5 El. c. 9.

<sup>e</sup> 2 Sal. 514.

<sup>f</sup> 2 Hawk. 432.

<sup>g</sup> Bl. com. 4 vol. 402.

it is of persons jointly prosecuted with others, but not affected by the evidence produced on the part of the prosecution; or <sup>s</sup> who have submitted, and been fined: these may be witnesses for co-defendants.

If one be <sup>h</sup> outlawed in a civil suit, and not upon any criminal accusation, it is said, he may be a witness: but an <sup>i</sup> excommunicate person is rejected.

A remarkable point of evidence, relative to this head, occurred in the <sup>k</sup> case of the earl of Warwick, tried by the house of lords for murder at the end of the last century. One French, who had been convicted of manslaughter, and allowed his clergy, but not burnt in the hand, was called as a witness for the arraigned lord. The attorney and solicitor-general contended, that French could not be sworn, unless he had been burnt in the hand, which would have amounted constructively to a statute pardon, or had been actually pardoned by the king. On the other hand, it was a plausible argument of sir Thomas

<sup>r</sup> Str. 633.      <sup>h</sup> 1 Inst. 6. b.    <sup>2</sup> Hal. H. P. C. 277.

<sup>i</sup> Gibb. cod. 1096, 7.    <sup>2</sup> Bul. 154.      <sup>k</sup> 3 Wms. 456.

Powys, that, after the party convicted of manslaughter had been allowed his clergy, it was a very unreasonable objection against him; that he had not that mark of infamy impressed upon his hand, and to say, he could not be a witness in a court of justice, *because* he had not been branded as a felon. The lords desired the opinion of the judges, which was, that the <sup>1</sup> statute does operate as a pardon; but then the words are, that the offender, after the allowance of his clergy, and burning in the hand, shall be enlarged out of prison; so that both conditions are precedent, and till they are complied with, the party remains convict of felony, and consequently not a good

<sup>1</sup> The st. 19 G. III. c. 74. § 3. substitutes a discretionary power of fining, or ordering to be whipped, felons convicted, and liable to be burnt in the hand, in lieu of the latter punishment; and ordains, that such fine or whipping shall have the same effect in restoring them to their credit. But felons convicted of petty larceny were never subject to burning in the hand; as they were never in need of praying their clergy. There was therefore this inconsistency: convicts of grand larceny, who had undergone the sentence of the law, were competent witnesses; convicts of petty larceny, who had also undergone the sentence of the law, were incompetent. This is rectified by st. 31 G. III. c. 35, which provides, that no person shall be an incompetent witness by reason of a conviction for petty larceny. In the same manner, by the laws of the Hebrews, a delinquent, after the infliction of the sentence of whipping, was restored to his capacities. (1 Seld. 1503. Wilk. ed.)

witness:

witnesses : and therefore the evidence of French was inadmissible.

The exceptions to witnesses, hitherto considered, are, as I have said, of a general nature. There are, besides, others, confined to *particular causes* only, and which arise either from *the matrimonial connexion*, or from having some *interest* in the event of the suit depending.

I. It is a general rule, that <sup>m</sup> *a husband and wife* cannot be evidence for or against each other. If such testimony should be adverse, it might breed implacable dissension : if favorable, there would be alarming danger of perjury from the oaths of persons under so great a bias. The same <sup>n</sup> maxim is adopted in courts of equity. But one exception to it may be found there, which happened in a case <sup>o</sup> particularly circumstanced : the wife lived separate from her husband, and appeared to the plaintiff (who was her domestic ser-

<sup>m</sup> 1 Inst. 6. b. See 2 Kel. 62.

<sup>n</sup> 2 Ch. ca. 39. 2 Vern. 79.

<sup>o</sup> 1 Eq. ca. abr. 226, 7.

vant) as an unmarried woman, and as such transacted with her the business in dispute. A peer<sup>p</sup> was convicted in the last century of a capital crime, his wife being admitted as an evidence against him; but<sup>q</sup> such admission of her testimony has since been thought against law. And tho one<sup>r</sup> book of authority may seem to imply, that husband and wife may be witnesses against each other in treason; the contrary opinion is<sup>s</sup> better supported, and so far in general prevails, that<sup>t</sup> such testimony is rejected, if it barely tend to criminate persons in so near a relation to each other.

Some seeming deviations however from the rule are enforced by a strict necessity. For a<sup>u</sup> woman has been allowed to prove a forcible abduction and marriage, not being in such case a wife *de jure*. She may<sup>x</sup> also upon her oath demand sureties of the peace against her

<sup>p</sup> Hut. 116.—It seems by the same case in 1 St. tr. 370, (ed. 1730.) that her examination was *read*. Other examinations are also declared in that case to have been read, contrary to the present rules of evidence.

<sup>q</sup> T. Raym. 1. 1 Vent. 244. <sup>r</sup> T. Raym. 1.

<sup>s</sup> 1 Brownl. 47. 2 Hawk. 432. marg.

<sup>t</sup> 2 Durnf. & East 268, 9. <sup>u</sup> 1 Vent. 243, 4.

<sup>x</sup> 2 Hawk. 432. Burr. 631.

husband,

husband, or <sup>y</sup> he against her. And by express <sup>a</sup> statute, the wife of a bankrupt may be examined by the commissioners for the discovery of his estate: the <sup>a</sup> contrary whereof was holden to be law before the passing of that act of parliament.

But no other degree of kindred excludes a person's testimony by our laws, widely differing in this respect from those of Rome. That rule of the civilians, <sup>b</sup> *testis idoneus pater filio, aut filius patri, non est*; and that their other principle, *parentes* <sup>c</sup> *et liberi invicem ADVERSUS se nec volentes ad testimonium admittendi sunt*, might perhaps be reasonable. But <sup>d</sup> even distant relations could not be compelled, according to their law, to attest against those, to whom they were allied. This was giving as large impunity to guilt, as by the <sup>e</sup> civil insti-

<sup>y</sup> Str. 1207.<sup>a</sup> 21 J. I. c. 19. § 6.<sup>a</sup> 1 Brownl. 47.<sup>b</sup> Dig. l. xxii. t. 5. le. 9.<sup>c</sup> Cod. l. iv. t. 20. le. 6.

<sup>d</sup> Dig. l. xxii. t. 5. le. 4.—In France, as to civil suits, it was carried much farther; for by an ordinance of 1667, the testimony of relations and allies of the parties, even down to the children of second cousins inclusively, is rejected in civil matters, whether it be for or against them. (1 Domat. 426. Strahan's ed.)

<sup>e</sup> 1 Seld. 1520. (Wilk. ed.)

tutions of the Hebrews, which at the same time specified very numerous exceptions against witnesses, and made a party's<sup>f</sup> *confession* insufficient to convict him without concurrent attestation.

II. The other exception to evidence, which I mentioned as extending only to particular trials, is where a man is *interested* in the event. The<sup>g</sup> minuteness of such interest will not destroy the force of the objection. Indeed we ought not to think so meanly of mankind, as to suppose that a small advantage would often countervail a solemn oath. But the rule notwithstanding is and ought to be invariable. For it becomes not the law to administer any temptation to perjury: and it is moreover impossible to draw a line, or adapt any general criterion to the different degrees of probity, that are experienced in the world. It is of no importance, <sup>h</sup> whether the benefit expected be direct and immediate, or only con-

<sup>f</sup> 1 Seld. 1497. (Wilk. ed.)—This institution has, in modern times also, been thought reasonable. (Vol. II. 495.)

<sup>g</sup> 2 Vern. 317.

<sup>h</sup> Lord Raym. 1007. 3 Lev. 152, 3. See 2 Hal. H. P. C. 280, 1.

sequential.

sequential. But it must be a present interest, not a future contingency. Thus<sup>1</sup> an heir at law may be a witness concerning the title of the lands; for nothing vests in him, during the life of his ancestor: but he, to whom the lands are limited in remainder, cannot be examined, however improbable his chance may be of ever succeeding to the possession of the estate. A<sup>k</sup> surety in a bail bond cannot be a witness for the principal, because he is directly and immediately interested. But the bare possibility of an action being brought against a witness is no objection to his competency. For the purpose of rejecting him, it must be proved, that he will derive a certain benefit from the determination of the cause one way or the other. And with this view, it is very material to consider, whether the verdict, to be influenced by his testimony, can be given in evidence by the witness in his own favor on any future occasion.

The time of a man's becoming interested may also be material. For it hath been<sup>1</sup>

<sup>1</sup> 1 Sal. 283. 1 Hal. H. P. C. 306.

<sup>k</sup> 1 Durnf. & East 164. 3 Durnf. & East 33, 34. 309, 310.

<sup>1</sup> Skin. 586. Ca. temp. Holt. 754. 3 Durnf. & East 33, 34.

holden, that if one make himself a party in interest, after the plaintiff or defendant are intitled to the benefit of his testimony, he shall not thereby deprive them of it. So where<sup>m</sup> a witness was interested, when examined, but released her interest, and was re-examined, tho it was objected, she was engaged by what she had formerly sworn, and could not be free to retract or contradict it, yet the lord keeper admitted the depositions. And in<sup>n</sup> another case more remarkable, where a witness was disinterested, but afterwards became the plaintiff in the cause, the depositions were allowed to be read.

Such in general is the effect of being interested as it is a legal exclusion from giving testimony: which may be ascertained by examining the witness himself, or bringing other proof; but it is said<sup>o</sup>, a party cannot have recourse to both these methods.

There were formerly two singular exceptions to evidence, which may be thought

<sup>m</sup> 2 Vern. 472.

<sup>n</sup> 2 Vern. 699, 700.

<sup>o</sup> 10 Mod. 193.—The rule formerly was to disallow objections taken to the competence of a witness, as too late, after he was sworn *in chief*, that is, generally, to give evidence: this is in some measure relaxed; but still the objections must be taken at the trial. (1 Durnf. & East 719, 720.)

something

something unreasonable. One was, that <sup>p</sup>, in proving an heir to be out of his minority, no witness was admissible, that was not forty-two years of age; as if it were necessary, that he should be twenty-one years old at the time, to which his testimony was to relate. The other exception was, <sup>a</sup> *mulieres ad probationem status hominis admitti non debent*, a female witness could not prove a man to be in a state of villenage. That condition of life is at an end: and women are no longer repelled, in any case, from making attestation.

Among the Romans, <sup>r</sup> *mulier testimonium dicere in testamento non poterit*. The <sup>s</sup> reason of which was, that the female sex were not allowed to be present at the public assemblies, where wills were ratified. Perhaps it would be difficult to assign so satisfactory a ground for all the numerous exceptions to testimony established by that law. If it be retorted, that with us there is too open an access to witnesses, that objection is obviated by the intervention of a jury, who are to judge of the credit of such as are examined before them, and have the amplest opportunities of form-

<sup>p</sup> Bro. t. testmoignes 30.<sup>a</sup> 1 Inst. 6. b.<sup>r</sup> Dig. l. xxviii. t. 1. le. 20. § 6.<sup>s</sup> Wood's civ. law, b. i. c. 1.

ing a just determination. But the Roman civil law seems more indefensible in another respect. I mean, in ' specifying several pleas, by which those, who are called upon to attest, may excuse their nonattendance: and which must be thought very tyrannical exemptions, in derogation of natural equity.

Having discussed the *competency* of witnesses, their absolute rejection or admission, it remains to consider their "*credibility*." And \* it has been the unanimous and rational inclination of great judges, in more modern times, to confine the objection to the credit, instead of the competency, of witnesses, leaving the question of their veracity open to such observations, as the superior wisdom and experience of the court may justly enforce.

\* 1 Domat. 426. 429. (Strahan's ed.)

" " In acts of parliament, which direct convictions upon the oaths of witnesses, the epithet *credible* is added, but by no means intended to signify *competent*: that is implied in the term *witness*. But it is intended (from abundant caution) to declare, that the competent witnesses swear positively, their credibility is to be weighed: and if the magistrate think the evidence not credible, he ought not to convict." (Burr. 417.)

\* 3 Durnf. & East 32. Besides which, it is a very common practice to render a witness competent by his executing of a release. And by divers acts of parliament, witnesses, possibly objectionable, are made competent. (St. 1 A. ft. 1. c. 18. § 13.—25 G. II. c. 6. § 1, 2, 3.—32 G. III. c. 56. § 7.)

“*Sæpe inter testes (says<sup>1</sup> Quintilian) et argumenta quæsitum est. Inde scientiam in testibus et religionem, ingenia esse in argumentis dicitur: hinc testem gratiâ, metu, pecuniâ, irâ, odio, amicitia, ambitu fieri, argumenta ex naturâ duci; in his judicem sibi, in illis alii credere.*” Cicero<sup>2</sup> expresses himself to the like effect: “*potest igitur testibus judex non credere? cupidis, et iratis, et conjuratis, et ab religione remotis, non solum potest, sed etiam debet. Etenim si, quia Galli dicunt, idcirco M. Fonteius nocens existimandus est, quid mihi opus est sapiente judice, quid æquo quæsitore?*”

In causes concerning civil rights and property, that side must prevail, in favor of which probability preponderates: but the<sup>3</sup> humanity of our law never esteems the turn of the balance sufficient to convict a man of any, especially a capital, crime. For it requires a very strong and irrefragable presumption of guilt to justify the infliction of the severer human punishments,

The credibility of witnesses depends on their number, skill, and integrity.

<sup>1</sup> Inst. Orat. l. v. c. 7.

<sup>2</sup> Pro. M. Fonteio. 6

<sup>3</sup> 10 Mod. 194.

I. But altho their *number* corroborates and confirms the proof, yet our law in general allows one witness to be sufficient, in causes determined by a jury. To this rule there are but two exceptions. First, in all cases of<sup>b</sup> high treason, whereby corruption of blood may ensue, and of misprision of such treason, two witnesses are required. This safeguard was originally devised in the auspicious reign of Edward the sixth, not from any desire of adopting the precept of Constantine, “*ut unius omnino testis responsio non audiat*,” but to frustrate falsely concerted accusations in matters of state, which may be ranked among the most dangerous and destructive machinations of human depravity.

The other exception is, that a<sup>c</sup> conviction of perjury must be grounded on the testimony of two at the least, for a very obvious reason, namely, that otherwise there would only be one oath in opposition to another.

Altho devises of lands are by the<sup>e</sup> statute of frauds to be attested by three witnesses, yet

<sup>b</sup> 1 Hal. H. P. C. 297.    <sup>2</sup> Hawk. 428.    St. 7 W. III. c. 3.

<sup>c</sup> Cod. l. iv. t. 20. l. 9.

<sup>d</sup> 10 Mod. 194, 5.

<sup>e</sup> 29 C. II. c. 3.

it is not absolutely necessary, that more than one of them should give evidence to a jury, before whom the authenticity of the will is contested. But a <sup>f</sup> court of equity will not, in any case, ground a decree for the complainant on the testimony of a single deponent, if it be negatived by the defendant's answer, for that also is upon oath. So <sup>s</sup> in those few and unimportant instances, where the trial may be *per testes*, without the intervention of a jury, there must be more than one to prove the affirmative allegation.

In <sup>b</sup> testamentary causes, which are part of the ecclesiastical jurisdiction, two witnesses are required, who must be unexceptionable according to the rules of the imperial, and Roman canon, law, to which those courts conform their decisions. Therefore in such case, a child cannot give evidence for its parent, being excluded by the express text of the digests: and this is not a ceremonial, but an essential, part of the Roman institutions, and binding on the spiritual judge. Moreover exceptions to witnesses among the civilians are

<sup>f</sup> 1 Vern. 161. 3 Ch. ca. 123. 2 Vern. 554. 1 Eq. ca. abr. 229. <sup>e</sup> 1 Inst. 6. b. <sup>h</sup> 1 Wms. 10 &c.

not to be compared to such as lie against witnesses at common law, where the trial is by a jury, but rather to exceptions taken to the jurors themselves; and this of proximity of kindred is a good cause of challenge to a juryman at common law. Consequently both the witnesses are to be of unimpeachable credit: and the <sup>1</sup> maxim, "*testis unius inhabilitas et defectus suppletur ex fide et habilitate alterius*," was never recognized by the ecclesiastical tribunals of this country.

II. The *skill* of witnesses is certainly a most material consideration in determining their credibility: and it is very obvious to inquire, how they happen to know the truth of what they depose. Artificers are manifestly best qualified to instruct a jury in the value of workmanship and the price of labor: or if the matter in litigation be, whether a diseased patient was judiciously and scientifically treated, it must depend on the testimony of persons skilled in the medical profession. "*Cuiuslibet credendum est in suâ propriâ arte*," is the maxim of reason and of law.

<sup>1</sup> See Heinec. de labricit. jurisjurandi suppletorii.

With the same view, it is expedient to discuss the opportunities, which the witness had, of making just observations, and his condition, circumstances, and temper of mind, at the time, to which his evidence relates. Lord Clarendon <sup>k</sup> gives the following narrative, which may serve as a striking instance of the fallibility of well-intentioned witnesses. At the fire of London, a servant of the Portuguese ambassador was seized and ill treated by the populace, a substantial citizen being ready to depose, that he saw him throw a fireball into a house, which instantly burst into flames. The foreigner heard the charge interpreted to him with marks of great astonishment. Then, protesting his innocence, he said, he recollected, that, in passing the streets, he observed a piece of bread lying on the ground, which, according to the custom of his country, he took up and walked with, till finding a shop-window open, he deposited it there to prevent its being wasted. Which principle is so strong in his nation, that the king of Portugal himself would have acted with the same scrupulous regard to general economy. On resorting to the place, the bread was found as

<sup>k</sup> Contin. 349.

described:

described: and it was not that, but an adjacent house, which was burning; an easy mistake, the witness being on the other side of the way, and intent on having the supposed criminal secured: to which we may add, that the consternation, occasioned by that portentous calamity, would prevent an accurate observation. No one will think the testimony of the citizen intentionally false: and as little doubt will be conceived of the innocence of the accused: the *evidentia rei*, notwithstanding the positiveness of the charge, must in this case be deemed sufficient for his acquittal.

On this idea of possible deception, the law rejects<sup>1</sup> *hearsay* evidence, always requiring the best proof, of which the nature of the case is capable. But *hearsay* is manifestly farther removed from certainty, than that which a man deposes of his own knowledge. For in the former instance, we are to give credit to two propositions instead of one, first believing,

<sup>1</sup> This objection is ranged here as not going to the general competency, but the particular credibility. (See 3 Durnf. & East 707—726.) The more usual occasions of admitting such testimony are in proof of pedigrees or of prescriptive rights. (See 3 Durnf. & East 709. 719. 723.)

that

that the witness really heard what he affirms on oath; and secondly, that what he heard, is true. Besides, there is little reason for believing what the witness heard to be true; since the person, who asserted it, was not upon oath, and the party to be affected by the assertion, had no opportunity of a cross-examination. Yet in some<sup>m</sup> cases, (as in proof of some prevailing customs, or of matters of common tradition and repute) the courts admit of an account of what persons deceased have declared in their life time: but such evidence will not in general be received of any distinct facts. Thus if it be<sup>n</sup> purposed to prove the custom of a manor, relating to descents, you must *first* establish a particular instance of lands so enjoyed, and you may then shew, by the general reputation, that such was the custom of the manor. But you must first give evidence of some correspondent fact or example. General reputation in the country or neighbourhood, thus restricted, is frequently admitted in evidence: which may seem the more just and proper, since<sup>o</sup> juries

<sup>m</sup> 3 Black. comm. 368. Burr. S. C. 701. Cowp. 591 &c.

<sup>n</sup> Per Heath J. at Oxford Spring assizes 1784.

<sup>o</sup> St. 4 A. c. 16. § 6, 7. 24 G. II. c. 18. § 3.

are now, in most civil suits, to come out of the body of the county, and none of them need, as formerly, to belong to the particular district, in which the cause of litigation arose. Lastly, the courts constantly receive testimony of things said in the presence of the plaintiff or defendant, and uncontradicted, tho not positively assented to, respectively by them: but this is inconclusive, and may often lead to fallacy.

III. The remaining and most important point, affecting the credibility of witnesses, is their *integrity*. “*Aut oratio testium* (says Cicero) *refelli solet, aut vita laedi.*” It is impossible to define, how many ways a man’s veracity may become suspected, or how many causes may give a wrong bias to his affections. It may be proved, from various causes, that his wishes and testimony strongly tend the same way: as that he<sup>a</sup> stands in the same situation with the party, for whom he is called to give evidence, or in a near relationship or degree of friendship to him; or on the other hand, that there subsists inveterate en-

<sup>p</sup> Pro L. Flacco. 10.

<sup>a</sup> 3 Durnf. & East 33.

mity between them; according to the rule of the civilians, "*inimicorum* <sup>r</sup> *quæstioni fides haberi non debet, quia facile mentiuntur.*" The fact sworn to may be shewn to be impossible by circumstances, tho no other person be mentioned as present, and positive testimony may be thereby refuted. So the declarations of a witness at another time may be material, where they vary from his present evidence, or where they betray any fraudulent design for or against either of the parties affected by his depositions. Where <sup>r</sup> such declarations agree with the evidence given in court, they may be admitted to corroborate it, and to shew, that the witness always persisted in the same account. To this head may be referred the <sup>r</sup> objection, that a witness shall not, in general, be allowed to invalidate an instrument, which he himself has signed; because it is holding out false credit to the world, evinces duplicity, and would facilitate frauds. Again, the deportment of witnesses, at the time of examination, as was before intimated, is highly important. That complaint of "Cicero may

<sup>r</sup> Dig. l. xlviii. t. 18. le. 1. § 24, 25.      <sup>s</sup> 1 Mod. 283.

<sup>t</sup> 1 Durnf. & East 300 &c.    3 Durnf. & East 34. 36.

<sup>u</sup> Pro L. Flacco. 4.

very frequently be justly repeated: "*nunquam nobis ad rogatum respondent; semper accusatori plus quam ad rogatum.*" Thus it is usual to remark, whether they give ready answers with an air of probability to such occasional questions as are proposed, or persist in the same premeditated recital and uniformity of expression; whether their account is steady and consistent, or differing in circumstances, pronounced with apparent irresolution, or betraying any doubt or uncertainty in their own minds. But if <sup>\*</sup>a witness can, from his recollection, swear positively to the general fact, it is the constant practice to allow him to refresh his memory, as to particulars, by written memorandums made by himself. Lastly, sometimes the credit of a witness is more directly attacked, where it happens, that, altho he is not legally branded with infamy so as to be totally rejected from giving evidence, yet the vileness of his character renders his testimony suspected. In such case, general accounts may be given of his reputation, as that he is not a person to be believed on his oath; but it is not permitted to charge him with any particular crime, against which it is

<sup>\*</sup> 3 Durnf. & East 754.

not to be presumed, he should be prepared to make a defence.

These are the modes adopted in our courts for judging of the veracity of witnesses ; whom we have considered from the time of compelling their appearance to the judgment, which ought to be formed of their depositions. As to those enumerated particulars, in which our law differs from the practice of the civilians, the recital of them seems sufficient to evince, in general, their superior reason, without urging many arguments to display the excellence of our municipal institutions.

## LECTURE LIII.

*Of written evidence.*

**I**N the last lecture I discoursed on that branch of evidence, which is delivered in courts *vivâ voce* by witnesses. The other branch thereof is *written or instrumental testimony*, including such legal means of authenticating contested facts, as do not fall under the other head of *parol* evidence.

Writings and instruments, admissible in courts as evidence, may perhaps, not unusefully, be distributed into four kinds; first, *acts of parliament*; secondly, *judicial and other memorials of courts*; thirdly, *public*, and fourthly, *private, writings and instruments*.

I. As to the first kind, we must recollect the distinction between public and private *acts of parliament*; the former of which are the general law of the land, and must officially

cially be taken notice of by the courts of justice; the latter must be specially pleaded and alleged by the party, who would avail himself of their effect. It is commonly said, that the printed statute book is good evidence of general statutes, but not of private ones. That, which is meant or intended by this observation, is, I believe, true in law: but it seems exceptionably expressed. The contents of public acts of parliament are not properly, in a legal sense, matters of fact to be ascertained by any kind of evidence. They are parts of the general law, which every person, especially the judges, are supposed to know already. The printed statute books are therefore referred to, as hints to refresh the memory, in a manner something analogous to the permission, constantly given to a witness, of recurring to such memorandums, as he has taken at the time of any transaction of an intricate and complicated nature, and of which he has a general, not a particular, recollection. But every man is not equally bound to know private acts of parliament. Of these therefore regular evidence must be given; which in all cases is to be the best, of which the nature of the thing is capable. Each private party cannot have the parliament roll itself

to answer his occasional purposes; but he must <sup>a</sup> adduce a copy compared with that roll, and not the copy of a copy. Some laxity however seems to have obtained, in respect even to private statutes. Such of them, for instance, as concern a whole county, may, it is <sup>b</sup> said, be evidenced to a jury, by the printed statutes, or without comparing them with the record, the extensiveness of their operation being a ground to presume their notoriety.

If a <sup>c</sup> defendant plead a private act of parliament, the plaintiff may reply *nul tiel record*, that there is no such record; and in this case, the defendant must produce an exemplification of such private statute under the great seal. But <sup>d</sup> if a public act of parliament, of which the judges are bound *ex officio* to take notice, be set forth in pleading, the other party cannot answer *nul tiel record*, because every man is, in law, privy to it; but if the statute be misrecited, there ought to be a demurrer.—It is now very usual in acts of parliament, of

<sup>a</sup> Sty. 462.—And in pleading a private statute, a misrecital of the time, when the parliament was holden, is fatal. (Cowp. 474 &c.)

<sup>b</sup> 12 Mod. 216.

<sup>c</sup> 2 Sal. 566. 10 Mod. 126.

<sup>d</sup> 8 Co. 28. a. Godb. 178.

a private nature, to insert a clause, expressly declaring them to be public statutes.——Foreign <sup>e</sup> laws, written or unwritten, must be proved as facts, if their existence be controverted.

II. I am secondly to mention such evidence as consists of *judicial and other memorials in courts*; of which I shall not pretend to enumerate every kind, but shall signal out some of the most frequent instances of written testimony, falling under this class. First then, where <sup>f</sup> a prior judgment for the same cause of action is pleaded in bar of the suit depending, the replication is *nul tiel record*: if the record of the prior judgment be in the same court as the second action has been brought in, it is to be inspected by the judges there; if otherwise, the party has a day assigned to him to produce it, that is, an exemplification. For the <sup>g</sup> records themselves being things, to which every man has a right to have recourse, cannot be transferred from place to place, and therefore an exemplified copy must avail. At

<sup>e</sup> Cowp. 174.      <sup>f</sup> Lut. 945. Carth. 517. 2 Sal. 566.

<sup>g</sup> Bull. nisi prius 222. 12 Mod. 500.

the day for bringing in the record, judgment shall be given for or against the party pleading it, according as he produces or fails of such record; but an<sup>h</sup> immaterial variance shall not prejudice him. Exemplifications<sup>i</sup> of records are either under the seals of the courts transmitting them, (to<sup>k</sup> which other tribunals ought to give credit) or under the great seal; which latter kind of authentication is only used, where they originally belong to the custody of the chancery, or have been regularly sent for into that court.

Besides records exemplified under the great seal, or the seal of particular courts, there are forensic proceedings, which do not require so much solemnity, in order to become admissible evidence. Thus, if<sup>l</sup> at a trial before a jury, a rule or order, made by the courts of king's bench or common pleas, be produced under the *hand-writing* of the proper officer in that behalf, there is no need of proving it a true copy, because it is an original. A<sup>m</sup> copy also of the inrolment of the grant of chief clerk in the king's bench, being the

<sup>h</sup> Hob. 209. See Lut. 946.

<sup>k</sup> 2 Sid. 146. 1 Keb. 21, 22.

<sup>l</sup> 1 Vent. 296.

<sup>i</sup> Bull. nisi prius 222.

<sup>j</sup> Lord Raym. 745.

copy of a record, has been admitted as evidence. But <sup>n</sup> a copy of an entry in the books of the office of faculties was disallowed to be evidence, and the book itself was necessary to be produced.

An *affidavit* <sup>o</sup> cannot, in general, be read in evidence *before a jury*. But <sup>p</sup> if the party, who made the affidavit, be sworn and give testimony, his own affidavit may be read against him, in order to discredit him, by shewing any variance or contradiction. An <sup>q</sup> affidavit, taken before a furrogate, tho an extrajudicial act, there being at that time nothing in contest before the ecclesiastical court, has been allowed by the court of delegates to be read, in confirmation of other evidence, after the decease of him, who made such affidavit. This

<sup>a</sup> Lord Raym. 745.

<sup>b</sup> As to *ex parte* depositions and examinations, see the reasoning of the court, who were divided, 3 Durnf. & East 708—726. Affidavits are the usual grounds of motions and proceedings in term time, as in aggravation or mitigation of a criminal sentence, the deponents generally verifying facts of their own knowledge. An affidavit *of hearsay* was admitted, where the original witnesses had *refused* to be sworn, but admitted with this caution, viz. that the defendant and the persons so refusing should have an opportunity of answering the facts alleged. (2 Durnf. & East 203, 4. n.)

<sup>p</sup> Skin. 403.

<sup>q</sup> Str. 35.

perhaps turned on the nature of the thing to be proved; for it was an acknowledgment of the party's own marriage. On the other hand, the court<sup>†</sup> refused to hear depositions read, there being no proof of the death of the deponent, tho they were taken about fifty years before the depending trial, and were produced from a reliance on the length of time, as that would have served to authenticate a deed of the same date. The judge however said, if proper searches or inquiry had been made, and no account could be given of him, he would have admitted the evidence at such a distance of time. I cite this case also for the sake of explanation and discussion. As to the comparison then made at the bar between an old deed and an old deposition, there is no analogy between them. An old deed may shew, that the party, executing it, *granted, released, or the like*; which is the thing to be proved. An old deposition can only shew, what the party swore; not that what he swore, was true. Therefore if the death of the deponent *had been* strictly proved, this would not have removed the force of the objection, which is, that an *ex parte* depo-

<sup>†</sup> Str. 920.

sition, without opportunity of cross-examination, is no evidence at all. But ' where a person has been examined, and has been, or might have been, cross-examined in chancery, his deposition may be used as evidence in a cause at common law *between the same parties*, or those ' who stand in privity of interest or estate respectively with them, if it can be proved, that such deponent is dead, unable to attend by reason of sickness, out of the kingdom, or not amenable to the process of the court. If " *decrees* of courts of equity be given in evidence, they ought to be preceded by the pleadings of the parties in the cause there, viz. the bill and answer; and the <sup>x</sup> proceedings must be between the same parties, or claimants respectively under them. So <sup>y</sup> also *a bill or answer* in equity are separately evidence against those, who are the authors of them, if the former be proved to have been filed with the party's privity, against whom it is produced, or proceedings have been had upon it. But a bill in chancery has been

\* 1 Atk. 445.

' 3 Durnf. & East 721.

" 1 Keb. 21. 2 Mod. 231.

<sup>x</sup> Hard. 22.

<sup>y</sup> 1 Ch. ca. 65. 1 Sid. 221. Godb. 326. See 8 Mod 181, 2. 1 Vent. 66.—Fitzgib. 197. cont. as to a bill. But the rule is to admit it, tho of little weight.

holden,

holden, and is indeed in reason, considering the manner of preparing it, of slight moment. An *answer*<sup>z</sup> likewise to a *libel* in the spiritual court may be read against the party elsewhere. For tho it is generally true, that depositions against a man in the spiritual court shall not be made use of before another tribunal, as in chancery, without some special order for that purpose, yet it is different of a person's own answer upon oath, tho it were taken voluntarily before a justice of peace. The<sup>a</sup> answer however of a trustee shall not be admitted against the *cestuy que trust*; nor<sup>b</sup> of a guardian against the infant; nor<sup>c</sup> of a vendor against his vendee by any claiming under the same alienor: for this last case favors of duplicity and fraud. On the other hand, an<sup>d</sup> answer has been allowed, to corroborate the proof of a deed, against claimants under the party, whose answer it was. It has been<sup>e</sup> said, that there ought to be proof, that the

<sup>z</sup> 1 Vern. 53.<sup>a</sup> 1 Keb. 281.<sup>b</sup> 2 Vent. 72. 3 Mod. 259.<sup>c</sup> 1 Sal. 286. 6 Mod. 44. See 2 Keb. 424.

<sup>d</sup> Lord Raym. 311.—In this case it was admitted to prove, that some of the defendants did derive their title under such person, by shewing the *constant reputation* in the country, that the lands were parcel of such person's estate. Qu. & see ant. 300 & n. & 301.

<sup>e</sup> Comb. 473.

answer was actually sworn. But in <sup>f</sup> a trial at bar, (when all the judges of the respective court preside) it was holden sufficient, that the answer was proved to have been filed in the fix clerks office, the regular department in that respect, belonging to the court of chancery. Depositions <sup>g</sup> have been allowed to be read in a subsequent cause, not between the same parties, but in which the defendant sheltered himself under the title of one, who was a party to the former suit. In this case it was said, that if an answer be read in evidence, the other side may insist on having the whole read. And it seems the established practice, in courts of law, that <sup>h</sup> reading part of an answer makes the whole evidence; tho in courts of equity, the plaintiff may read such passages as are available for his purpose, provided he does not stop in the middle of a paragraph, or leave the sense incomplete or unexplained. If <sup>i</sup>, in courts of law also, an answer be produced, not to prove the very issue between the parties, but only collaterally to shew a witness incompetent, then perhaps

<sup>f</sup> 12 Mod. 231.<sup>g</sup> 5 Mod. 9, 10.<sup>h</sup> 3 Sal. 154.<sup>i</sup> Bull. nisi prius 234.

the other side are not intitled to insist on having the whole read.

Another effectual part of written evidence, falling under this head of forensic proceedings, are prior *verdicts*. But their admissibility is subject to two equitable<sup>k</sup> restrictions. First, it is necessary that the former cause was not *res inter alios acta*; secondly,<sup>l</sup> that the matter so to be proved was really in issue in such former cause; because if the jury go out of their way to find, and insert into their verdict, things not relevant, it would be inequitable, that this should be conclusive, especially as in such case they are not liable to an *attaint*, a formidable check against any corrupt conduct in a jury, but which is now out of use. The former objection, that the prior verdict was *res inter alios acta*, must be qualified and explained. What is hereby required is that the verdict was such as either party to the subsequent suit might have had the benefit of and given in evidence, if in

<sup>k</sup> Another exception is mentioned, 12 Mod. 319, viz. that tho a verdict in a civil cause may be given in evidence in a criminal one, it does not hold *vice versa*.

<sup>l</sup> Hob. 53.

their favor: and that there was a litigant party in the prior cause, standing in the same right as one of the present parties, and con- tending against such verdict. For in <sup>m</sup> an action founded on a prescriptive right of toll, the court has very justly admitted to be read in evidence former verdicts in suits, com- menced on the same ground, against persons circumstanced as the defendant.

*A sentence<sup>n</sup> of the prize court of admiralty, (if the libel and answer there be produced) condemning goods as piratical, is evidence in an action of trover for the same goods. In<sup>o</sup> an action founded on a contract, ratified under seal at land, the sentence of a foreign ad- miralty was refused to be read in evidence. But the exception taken implies, that, if the original cause had been such, in which the British admiralty had had competent jurif- diction, the foreign sentence would have been admissible.*

*A sentence<sup>p</sup> in the ecclesiastical court con- cerning tithes may be given in evidence in an*

<sup>m</sup> Carth. 181.<sup>n</sup> 3 Com. dig. 283.<sup>o</sup> Str. 1078.<sup>p</sup> 2 R. A. 679. 2 Mod. 231.\*

action at common law, for it is a judicial act before a competent jurisdiction. So<sup>a</sup> also a sentence in the ecclesiastical court for or against a marriage is admissible evidence. Indeed a sentence<sup>r</sup> of the ecclesiastical court, in a criminal prosecution, for punishing fornication, cannot be given in evidence, in a cause affecting others, to shew, that the parties sentenced to such punishment, were not married. But a sentence on the lawfulness of the supposed marriage, that being a point, as well as the other, in which the court has proper jurisdiction, and such decision being pronounced in a civil suit, is admissible; and seems to have been<sup>t</sup> thought irrefragable and conclusive proof. It has however been since ruled<sup>t</sup> by the highest judicial authority, that such evidence is not conclusive in itself, and that the effect of it may be wholly invalidated, by shewing that the sentence was obtained by collusion, tho unreversed in the regular course of appeal. Wherever<sup>u</sup> the point of the marriage was not directly determined, but only inferred, as by the spiritual court's granting of administration to another person instead of the supposed

<sup>a</sup> Str. 960, 1. Rep. B. R. Hardw. 11. 18.

<sup>r</sup> 2 Vez. 246.

<sup>t</sup> Carth. 225, 6.

<sup>u</sup> 11 St. tr. 262. 2 Vez. 246.

<sup>v</sup> 1 Sal. 290.

widower,

widower, this was never thought conclusive, being a collateral matter. Farther, a \* sentence by the ecclesiastical judge of deprivation for simony has been allowed to be read as evidence against the party himself in an action in the temporal courts.

Lastly, the proceedings and memorials of *manerial courts* are perhaps as frequent matter of evidence as the acts of superior judicatures. The ′ copies of the court rolls are the regular proof for the tenants of the manor; for the rolls themselves are of a public nature and common concernment. But ″ where a particular benefit is sought by the lord, as a heriot or the like, considering that the steward may enter what he will into the court rolls, they ought to be admitted with caution, and either to be confirmed with *viva voce* evidence, or to have the sanction of considerable antiquity. In one † case, the house of lords allowed proof

\* 1 Freem. 84. ′ Comb. 138. 337. And the court will order leave to inspect the rolls, in favor of tenants of the manor, but not in favor of strangers. (3 Durnf. & East 141, 2.)

″ 3 Bul. 324, 5. 1 Keb. 287. Vin. t. evidence 105.—A *customary* of a manor, delivered down from steward to steward, tho not appearing to have the sanction of the manerial court, has been thought admissible in proof of the course of descents. (1 Durnf. & East 473.)

† Fort. 41—55. Str. 654—662. 2 Atk. 189.

to be made of the custom of a manor in the north of England, by shewing the custom of neighbouring manors, because the counties of Northumberland, Cumberland, and Westmorland were antiently under one earl. But<sup>b</sup> this, as a *general* question, is negatived by the weight both of reason and authorities.

III. I proceed to *writings, instruments and memorials of a public nature*, being neither acts of parliament, nor of the judiciary kind.

Wherever<sup>c</sup> an original is either a record, or of a *public nature*, and would be evidence, if produced, an immediate sworn copy will avail, as of a bargain and sale inrolled, whereby it becomes a record, and one cannot have the record itself; so also it is<sup>d</sup> of things not being records, as journals of the house of commons, transfer-books of public companies, church registers, and the like. For ge-

<sup>b</sup> Dougl. 513.—So in a question upon the custom of tithing in one parish, evidence that such is the custom in the adjacent parishes, is not admissible: but it might perhaps have been available, if it had been laid as the general custom of the whole county. (Cowp. 807, 8.)

<sup>c</sup> 3 Sal. 154. 12 Mod. 500. See Str. 1073.

<sup>d</sup> Dougl. 593, 4. n.

neral convenience absolutely requires, that parish registers, and such other memorials, in which many are interested, should be<sup>e</sup> kept in a certain place, where they may be resorted to, and that, on private particular occasions, a copy should suffice in evidence.

A question<sup>f</sup> was proposed to the judges of the common pleas, whether the copy of a *bank bill* remaining upon the file in the bank of England, was good evidence or not, who all agreed, that it was, as in the case of a parish register, the bank being a public body, established by<sup>g</sup> act of parliament, for public purposes.

The<sup>h</sup> *antient books of the heralds office*, or *their visitation books of counties*, are evidence to prove pedigrees. But a modern<sup>i</sup> entry in their books, and a pedigree ex-

<sup>e</sup> Therefore in a case about twenty years ago before lord O. Bathurst, where an antient terrier, belonging to the custody of the bishop of Bath and Wells, was brought up as proof in the suit depending, the Lord C. declared, that a copy would have been sufficient, and that he would write to the bishop, signifying the danger and impropriety of removing the original, or to that effect.

<sup>f</sup> 3 Sal. 155.      <sup>g</sup> St. 5 W. & M. c. 20. § 20.

<sup>h</sup> 1 Sal. 281. T. Jon. 224. Comb. 63. Str. 162.

<sup>i</sup> Vin. t. evidence 119. T. Jon. 224.

tracted (not being a literal copy) out of their antient *official* genealogies, appear to be no evidence. It is said <sup>k</sup>, a *copy* of their visitation books has often been rejected. But I see not upon what principle, if it were really an exact copy, and not a mere extract, or a map of a pedigree, deduced from those public originals.

A *general* <sup>l</sup> *history* may be admitted to prove a matter relating to the kingdom, but not to establish a particular right or custom. Thus Speed's chronicle was received to shew the time of the death of Isabel Queen Dowager of Edward the second.

It is said <sup>m</sup>, that the *almanac* is part of the law of England, of which the court must take judicial notice; and that the almanac to go by is that annexed to the common prayer book. But it seems all almanacs are indiscriminately admitted before a jury; and the doctrine may seem corroborated by considering

<sup>k</sup> Comb. 63.

<sup>l</sup> 1 Sal. 281. Skin. 15. 624. 12 Mod. 86. T. Jon. 164.

<sup>m</sup> 6 Mod. 41. 81.—An almanac, in which a father had written the day of his son's nativity, was allowed to be strong evidence of the nonage of the son, when he made his devise. (T. Raym. 84.)

them as helps or hints to refresh the memory in the *legal* computation of time; since the statute for alteration of the stile, 24 G. II. c. 23, prescribes at full length the calendar to be in future use, with tables for the moveable feasts, one of which is calculated to find easter-day from the year 1900 to the year 2199 inclusive.

What gives authenticity to other instruments, and ranks them in this class of evidence, is that they have the sanction of persons acting in a *public trust*, recognized by the law. Thus the "certificate of commissioners, appointed by act of parliament, for stating the debts of the army, was holden to be conclusive evidence.

*Corporation*° books are allowed in evidence, when they are publicly kept as such, and the entries made by the proper officer; so also are copies. But the copy of a letter, fifty years old, found in a corporation chest, was refused to be read, because it was not a corporate act, so as to make a copy of it evi-

° Str. 481.

° Str. 93. 307. 8. 401.

dence; but the original ought to be produced.

Lastly, by express<sup>p</sup> statutes, exemplifications of letters patent are declared to be as good and available as the letters patent themselves: which<sup>q</sup> provisions, by construction, have been resolved to be of very general extent.

IV. The last class of written evidence, of which I proposed to treat, comprehends *private writings and instruments*. And such<sup>r</sup> muniments seem admissible, not only to prove the principal matter contained in them, but also things therein recited, as against the party executing the instrument. Thus<sup>s</sup> the recital of a lease in a deed of release is good evidence of such release against the releasor, and claimants under him.

Here the general<sup>t</sup> rule is, that a copy is not evidence, but the original must be produced.

<sup>p</sup> 3 & 4 E. VI. c. 4. & 13 El. c. 6.

<sup>q</sup> 5 Co. 53. a. b. 1 Inst. 225. b. See Carth. 209. Comb. 46.

<sup>r</sup> But see Vau. 74. cont.

<sup>s</sup> 6 Mod. 44.

<sup>t</sup> Comb. 337. See 2 Atk. 541.

But

But <sup>u</sup> if it be shewn, that the adverse party has the deed, or if a deed be proved to have been burnt by accident, a copy may be given in evidence. So if <sup>x</sup> a deed be taken away or suppressed, by the adverse party, the want of its production may be supplied by parol proof, or by a copy. There <sup>y</sup> is in this respect no difference between civil and criminal prosecutions. In both, notice may be given to the adverse party to produce a deed or writing in his possession: he is not bound to do so: but if he decline it, a copy, or parol proof of the contents, is admissible in evidence. And if <sup>z</sup> according to such notice, an instrument be produced, it must be taken to have been duly executed, against the party, out of whose hands it comes. Farther, if a man <sup>a</sup> destroy a thing, designed to be evidence against him, it may be supplied with no greater degree of strictness: a copy, or mere parol proof of the contents, may be available.

A copy <sup>b</sup> of an agreement between the abbot

<sup>u</sup> 1 Mod. 4. 266.

<sup>x</sup> 1 Keb. 12. 3 Keb. 2. Str. 70.

<sup>y</sup> 2 Durnf. & East 201. & n. Ibid. 202, 3.

<sup>z</sup> 2 Durnf. & East 41, 42.

<sup>a</sup> Lord Raym. 731. *Ambl.* 249.

<sup>b</sup> Bunb. 191.—“*Idcirco statuimus et decernimus, immo in formam perpetui edicti et indispensabilis ordinamus, ut nullus de cætero,*

bot of Quarrer and the monks of Lyra was produced in evidence; to which it was objected, that it could not be read, being neither a record, nor a public instrument. But a copy of the Oxford statute was exhibited, forbidding any book to be taken out of the Bodleian library: and then the court allowed the copy of this agreement; tho they considered it as not within the general rules of evidence, but received it on the very particular circumstances of this case.

In a question of devise of freehold estates the probate of a will is no evidence: but the original will must be produced. For the proceedings in the ecclesiastical court, so far as relates to freehold, are *coram non judice*. This is carried so far, that<sup>d</sup> if a will of real

*cujuscunque loci aut statûs fuerit (omni prætextu, causâ, ratione cessante) quodcunque volumen, sive catenis illigatum, sive solutum, (quantâlibet præstitâ cautione, aut fide-jussoribus, de libro bonâ fide redhibendo) datum aut commodatum habeat.*" (Stat. bibl. publ. Bodl. § 8.) But it seems this statute should have been proved by a sworn copy. In a criminal case, the court refused the attorney general a rule for inspecting the university statutes. (2 Durnf. & East 202. n.)

<sup>c</sup> 2 R. A. 678.

<sup>d</sup> Comb. 46.—Yet it seems, that if a *deed*, which does not need inrolment, be inrolled, a copy may be read, without proof of the execution of the original. (Bull. nisi prius 252.)

estate should be exemplified under the great seal, it would not be evidence; for it is a private matter, not proper for that mode of authentication. But in regard to personal bequests, where the ecclesiastical judge has appropriated jurisdiction, the probate of a will is the genuine evidence.

Here we may incidentally advert to the rules, that obtain in regard to *explaining* a deed or will by parol evidence. A leading and authoritative case upon this subject was peculiarly circumstanced, but yet affords information of general use. A testator appointed two persons his executors and residuary legatees, one of whom was indebted to him by bond in the sum of three thousand pounds, and there was indubitable proof, that the testator intended to release this debt for the sole benefit of the debtor. Yet the two executors were decreed to divide the benefit. For it was said to be of the most mischievous consequence to admit parol evidence in contravention of the plain words of a will. But <sup>s</sup> where a person has

• Skin. 431. 584. Comb. 248.

<sup>1</sup> C. T. T. 240. 2 Atk. 372.

\* 2 Atk. 239, 240.—This doctrine was adopted and explained in a case in chancery M. T. 1771, when the lord C. Y 4 enforced

has been spoken of by some familiar appellation, not being his real name, or where two persons have had the same name of baptism and surname, parol evidence has been admitted to shew, who was meant by a testator. Parol evidence <sup>h</sup> however has been rejected, when adduced to explain the intention of a testator, where a blank only was left in the will.

The regular way of authenticating a deed or devise, and shewing that they are what they purport to be, is by calling the subscribing witnesses or one of them to give testimony, and if they be dead, by proving their hand-writing. Without such <sup>i</sup> proof, the confession of a man's executing a deed is not

inforced the established distinction, that parol evidence shall be admitted to elucidate a *latent* ambiguity, as where a devise is to J. N. and there is uncle and nephew of the same name, parol evidence shall be admitted to shew, which was meant; for the ambiguity itself arises, collaterally, from evidence, and *debors*, that is, out of the deed or devise; but where, as in the case then before the court, the ambiguity, whatever it is, is *patent* upon the face of the deed, there it shall not be triable by another medium. The authority of the case Joynes and Statham, 3 Atk. 388, had been cited as a precedent, where parol evidence was received even to alter the apparent purport of a written agreement. But the lord C. said, that case went upon the ground of fraud, the plaintiff himself having drawn the instrument.

<sup>h</sup> 2 Atk. 239, 240.

<sup>i</sup> Dougl. 216, 7.

available as against a third person. But <sup>k</sup> a deed of considerable antiquity, as thirty years, is said to prove itself, and the presence of the witnesses to its execution is unnecessary, provided there is no <sup>l</sup> rasure or interlineation in it, (which blemishes ought to be accounted for) provided also that some account is given where the instrument was found, or the like, and that it does not import any fraud. An <sup>m</sup> antient writing likewise, (not being a deed) proved to have been found amongst deeds and muniments of estates, may be given in evidence, altho the due making of it cannot be ascertained; for it is difficult to develop antient facts; and finding these instruments and memorials in such a place affords a presumption, that they were fairly obtained, and preserved for use, and frees them from the suspicion of dishonesty. But an <sup>n</sup> admittance into a tenement, holden of a manor, purporting to be under the steward's hand, tho above forty

<sup>k</sup> Bull. nisi prius 251.

<sup>l</sup> Formerly the courts decided, whether rasures and interlineations did not render the deed void. Now a jury determines the date of them, viz. whether made before executing the deed; (10 Co. 92, b.)—this confirms the reasonableness of requiring the actual production of original instruments.

<sup>m</sup> Dunc. tr. per pais 370 (ed. 1739.)

<sup>n</sup> Fort. 43.

years

years old, was rejected in evidence, because they could not prove the steward's hand.

If a ° subscribing witness become infamous, as by being convicted of forgery, and the record of his conviction and of the judgment be produced, his hand-writing may be proved, as if he were dead. In regard to proving a subscribing witness actually dead, stricter ° proof is necessary, where he has resided abroad, than if he had dwelled in England. As to the manner of proving hand-writing, the ° witness for that purpose produced ought to be able to depose, that he has seen the party write, and believes the matter or signature in question to be his hand-writing; unless in special cases, as where there has been any fixed correspondence by letters, and it can be made out, that the writer of such letters is the same person, who attested the deed, and then that will avail. But ° similitude or comparison of hands, where no witness is produced, who ever saw the party

• Str. 833.

° 2 Atk. 48.

° Fitzgib. 196. Bull. nisi prius 232.

° 12 Mod. 72.—Yet if the witness have a professional skill, acquired by habits of study and experience, in the kinds and manner of hand-writing, his opinion may be received in evidence.

write,

write, is in general not evidence, unless perhaps under particular concomitant circumstances; as \* where the writings were at least found in the prisoner's custody, and more especially where he was endeavoring to escape with treasonable papers into a foreign country, which was a strong corroborating proof.

It seems remarkable, that, altho the statute 7 J. I. c. 12. industriously provides, that a tradesman's shopbook shall not be given in evidence after the lapse of a year from the time the debt accrued, yet it † never was allowed to be evidence of itself within that period. It must be accompanied with other confirmation; proof being necessary, that the servant, who made the entry in the shopbook, is dead, that it is his hand-writing, and that he was accustomed, to make such entries, or the like.

On a similar principle, as it appears, rentals" are admitted in evidence, because the

\* See lord Preston's case, 4 St. tr. and the other authorities cited Barr. 644.

† 2 Sal. 690.

‡ Vin. t. evidence 132. Bunb. 46.'

bailiff or receiver charges himself with the specified sums. In a recent case\* in the exchequer, the effect of this kind of evidence was very attentively considered. The plaintiff claimed the lands in question as part of old inclosures demised for ninety-nine years under a rent reserved to the lord of the manor, which term was alleged to be expired. In support of such title, he produced the rentals of the family of fifty years date, which charged the steward with the receipt of such and such sums, and expressed, that thirteen shillings and four pence had been annually received for these premises by the name of inclosure on lease. The defendant contended, that the rentals were evidence only of the receipt of so much money, but were not admissible to prove in what right it was received, whether as a conventional or a quit rent. And it was urged, that, if they were admitted to that extent, a steward of a manor, by such insertions in his rentals, might convert all the quit rents of the manor into conventional rents on terms for years, and might even express,

\* *Harpur v. Brock Scacc.* T. T. 14 G. III. on a motion for a new trial in ejectment, before Smythe chief baron, Perrott, Eyre, and Burland, barons. See *Errata*.

when

when such terms would expire, and so get all the freeholds into the possession of the lord. But the court held: fraud is not to be presumed; and the rentals are admissible, not only to prove the receipt of the money, (which was agreed on all hands) but also to shew, in what right it was received. For otherwise the receipt of a gross sum of money proves nothing; it must be allowed to shew, that it was in respect of certain lands, which is evidence of tenure; and therefore it may shew the particular kind of tenure. The rentals in the hands of executors are evidence to charge or discharge them; which they could not do, unless they were allowed to shew the particular right, in which the money was received. The steward, if living, would be a competent witness: as he is dead, this is the next best evidence, and therefore admissible by the opinion of the whole court<sup>y</sup>.

The

<sup>y</sup> In this case it was said, that where a lease is proved, and it is also shewn, that the claimant hath received rent within twenty years, this infers a seisin in fee, and throws it on the adverse party to shew, that the lease is subsisting. And baron Eyre held, that, where rent is received, without any proof of a lease, this also *prima facie* is evidence for the plaintiff, and obliges the defendant to shew, that it was either a quit rent, or that the term is unexpired.—In a subsequent case, possession, and rent received, for twenty years were thought admissible evidence of a fee, to be left to a jury: tho the title, so far as it was

The matters, which I have here selected under my four distributive classes of written evidence, may serve to illustrate the leading maxim, that the best evidence is to be given, of which the nature of the thing is capable; and which it is in the power of the party to produce. The specific rules, adopted by our laws, are judiciously substituted as helps to common understandings. For there is<sup>2</sup> scarce any thing, in which men differ more than in their estimation of what is, or is not, sufficient and satisfactory proof.—I shall not enter into the old methods of impeaching testimony by *bills of exceptions*, and *demurrers to evidence*; which, as sir William Blackstone<sup>3</sup> observes, are less in use than formerly, since the extension of the discretionary powers of the court, in granting a new trial for misdirection of the judge at *nisi prius*.—But here one distinction between positive and presumptive proof is very obvious, viz. that he, who is convinced by positive proof, gives credit to this single proposition, that the witness swears true, the rest is a ne-

was developed, appeared to be a long term of years: but it might be a term attendant on the inheritance, and the lease one of the muniments of the estate. (Cowp. 595.)

<sup>2</sup> Locke on toleration letter iii. c. 5.

<sup>3</sup> Black. comm. 373.

cessary

cessary result; but he, who yields to presumptive evidence, may be deceived two ways, the witness may not swear true, and the consequence may not be justly inferred. Hence some have distinguished between strong, probable, and slight presumptions: which indeed are matters rather of general reason, than of instituted law.

We have now considered the means, by legal evidence, of ascertaining issues in fact. The other principal incidents before, at, and after trial, will be comprehended in the same lecture.

## LECTURE LIV.

*Of incidents before, at, and after trials by jury.*

IN speaking of personal actions we have already considered their several kinds, the pleadings in them, and the evidence, by which issues of facts are ascertained; which last is the most material incident in trials by jury, the most important to be considered, and requiring the amplest discussion. The other particulars are such as precede, attend, or follow this mode of trial. Some points, relative to the *time and place* thereof, may first deserve some notice.

When a matter of fact is directly affirmed on the one side, and denied on the other, whereby (as we have before seen) issue is said to be joined between the parties, there immediately follows on the record an award of the *venire*, beginning with the words, "therefore let a jury come," and expressing a  
time

time and place of trial, which are afterwards varied by the *nisi prius* process, in the manner described in the books of practice. The defendant must generally have eight days *notice* of the day of trial; if there have been a delay of four terms, a term's notice is necessary, unless<sup>b</sup> such delay was occasioned by the defendant, as by his obtaining an injunction. If the defendant reside above forty miles distant from the cities of London and Westminster, and the cause be to be tried at the sittings there, the st. 14 G. II. c. 17. requires ten days notice of trial, and six days notice of countermand.

The time and place of trial may also depend on *a motion for a trial at bar*, that is an application to have the cause tried in term time before all the judges of the respective

<sup>a</sup> As to errors in this transaction, and their being amendable or not, see 1 Sal. 48. Carth. 506, 7. St. 5 G. I. c. 13.  
<sup>2</sup> Will. 144, 5.

<sup>b</sup> Dougl. 71, 72. 3 Durnf. & East 530, 1.—If the defendant is under condition of accepting *short* notice of trial in country causes, this means at least four days before the commission day, one of the four inclusive and one exclusive. (3 Durnf. & East 660.) A plaintiff is not bound to give notice of trial till the term after that in which issue is joined, by the practice of the king's bench, tho said to be otherwise in the common pleas. (2 Durnf. & East 530, 1.)

court, to which the record belongs; and such court then appoints the particular day. The granting of trials at bar seems founded on the following clause in the old<sup>e</sup> statute of Westminster the second: "*inquisitiones de grossis et pluribus articulis, quæ magna indigent examinatione, capiantur coram justitiariis de bancis.*" Hence the<sup>d</sup> usual and proper grounds made for these applications are the value and difficulty of the cause, the probable length of the inquiry, and its complicated nature. This motion<sup>e</sup> was once denied, where the plaintiff was poor, unless the defendant, on whose behalf it was made, would consent, in case he succeeded, to take *nisi prius* costs. But in<sup>f</sup> ejectment, it seems, it may be granted, by favor of the court, tho the plaintiff sues *in formâ pauperis*. And as<sup>g</sup> the application is not a demand of right, but a favor asked, the court may lay the party applying under the terms of receiving the common costs, if he succeed, and if he fail, of paying the extraordinary costs: which is very equitable. The jury are regularly to come out of the county, in which the action is laid, as in other cases.

<sup>e</sup> 13 E. I. c. 30.<sup>d</sup> Dougl. 437.<sup>1</sup> Durnf. & East 367.<sup>e</sup> 2 Sal. 648.<sup>f</sup> 12 Mod. 318.<sup>g</sup> Dougl. 437, 8.

Therefore

Therefore a cause<sup>h</sup> cannot be tried at bar, where the action is laid in London, by reason of the citizens' charter, unless<sup>i</sup> the jurors waive their privilege as citizens of not quitting their precincts, or unless<sup>k</sup> the parties consent to have the cause tried by a Middlesex jury. I shall only add on this head, that<sup>l</sup> the motion for a trial at bar ought to be made in the term before that, in which the trial is intended to be had.

The place of trial may likewise be varied by *a motion to change the venue*; which is regularly to be made by the defendant, before he puts in a plea. We have before seen, that transitory actions may be laid, in order to being tried, in any county, where the plaintiff pleases. But then the defendant may move to change the venue into the proper county, on an affidavit, that the cause of action (if any) arose in Oxfordshire, (for instance) and not in Berkshire, (where it is laid in the declaration) nor elsewhere out of the county of Oxford; which<sup>m</sup> is the established form of the affidavit, and must be complied with. On the

<sup>h</sup> 2 Sal. 644.<sup>i</sup> 2 Wilf. 136.<sup>k</sup> Dougl. 438.<sup>l</sup> 2 Sal. 649.<sup>m</sup> Burr. 2452. 3 Durnf. & East 495, 6.

other hand, the plaintiff has the power of retaining the cause in the county, where he has laid it, if he will undertake to give<sup>n</sup> material evidence, that is<sup>o</sup> such as directly tends to support the action, in that county. These are the general rules. There have been<sup>r</sup> two cases, in which the venue has been changed from an English into a Welch county; indeed there was no opposition: but in the latter, the reason of this practice was considered; great inconvenience was apprehended, if it were not allowed; and the process being to be awarded into the next adjacent English county, there was no objection on that account. There seems much doubt in the books<sup>s</sup> as to changing the venue into a county palatine, and sending the record by *mittimus* to be tried there. But<sup>t</sup> the court ought, in all transitory actions, to change the venue into some other county, when it appears upon circumstances laid before them, that there is good ground to apprehend, a fair, impartial, or at least a satisfactory, trial cannot be had in the county, in which the action is laid,

<sup>n</sup> 2 Sal. 669.

<sup>o</sup> See farther 2 Durnf. & East 275 &c.

<sup>r</sup> Str. 1270. 1 Will. 221. Burr. 2450 &c.

<sup>s</sup> Str. 807. Lord Raym. 1418. Burr. 1564. 1 Durnf. & East 367, 8.

<sup>t</sup> Burr. 1564. Str. 874.

by reason of the prevalence of a local prejudice, conceived in relation to the cause, or the like. On the same grounds, the court will order an information in the nature of a *quo warranto* to be tried in the *next* English county, *into which the king's writ of venire runs*. This is a distinct motive from the cause of action having arisen in another county, and therefore 'exempt from the rule, which obtains in the other case, that the cause of action must wholly arise in the county, into which the venue is to be changed. There ought to be strong reason to suspect, that the trial will not be impartial and indifferent in the proper county. The " case of lord Shaftesbury, in which the venue was changed from London by reason of the earl's powerful influence there, has not given general satisfaction, especially as it was inconsistent with another rule, namely, not to change the venue in *scandalum magnatum*. As to changing the venue in actions for libels, the rule is made to conform exactly to the terms of the affidavit. If \* the libel have been dispersed in several English counties, the

• 1 Durnf. & East 363 &c.

• 1 Will. 178.

• See 1 Vern. 439.

\* 1 Durnf. & East 571. 647.

venue cannot be changed, for the defendant cannot truly swear in the prescribed mode. But<sup>y</sup> if the printing and publishing were in the same English county, or<sup>z</sup> if the libel were written here, and sent out of the kingdom, there is then only one English county, in which the cause of action arose. It seems a<sup>a</sup> pretty constant rule not to change the venue in debt; tho<sup>b</sup> it were for rent on a parol demise of lands in one county, and the action laid in another. But<sup>c</sup> where an action of debt for rent was brought in London, the lands lying in Gloucestershire, and the action betwixt the lessor and the lessee being grounded upon the contract, on affidavit made, that the defendant would plead a special plea, whereby the title of the estate would come in question, the court ordered the venue to be changed into Gloucestershire.

There is a great difference and distinction

<sup>y</sup> 3 Durnf. & East 306.

<sup>z</sup> 3 Durnf. & East 652, 3.

<sup>a</sup> 12 Mod. 579.——A motion to change the venue in debt being made on the ground that both the plaintiff's and defendant's witnesses resided in the county, into which, it was prayed, the venue might be changed, the court granted the rule on certain terms imposed on the defendant: but several similar applications have been rejected. (1 Durnf. & East 781, 2 & n.)

<sup>b</sup> Str. 878. Fitzgib. 166.

<sup>c</sup> 1 Freem. 260.

between changing the venue and *ordering<sup>a</sup> a cause to be tried by a jury of a different county, a suggestion* being for that purpose entered on record. And notwithstanding the locality of some sorts of actions, or of informations for misdemeanors, if the matter cannot be tried at all, or not fairly and impartially, in the proper county, it shall be tried in that next adjoining. But a general swearing to apprehension and belief, that an impartial trial cannot be had, will not be sufficient to infringe the rule of trying causes by jurors of the proper county; there must be particular facts alleged to warrant such a conclusion; and as the party cannot *traverse* the suggestion, when entered by a rule of court, there must be a clear and solid foundation for it.

Another application, antecedent to a trial, may affect the *time* of it merely, viz. *a motion to put it off*, on the common affidavit of the absence of material witnesses. In criminal or civil cases, a trial shall not be so hurried on as to do injustice, and an affidavit in common form may be sufficient, where no ground of suspicion appears. But where there is cause

<sup>a</sup> Burr. 1330. Str. 177.

<sup>•</sup> Burr. 1513.

to presume any tergiversation, it is, in general, necessary to satisfy the court, that the absentees are really material witnesses, that there has been no *laches* or neglect in omitting to procure their testimony, and that there is a reasonable expectation of their attendance at the future time, to which, it is desired, the trial may be postponed.

There are certain suits, in which a *view* of the premises, affected by the trial, may greatly facilitate an investigation into the truth of the points in issue. Another *motion*, therefore, preliminary to a trial, is *for such view*; the practice relating to which is regulated by divers<sup>f</sup> acts of parliament.

Lastly, another *motion*, antecedent to a trial, (and which, like that for a view, is a *motion of course*) is that the cause may be tried by a *special jury*. The<sup>g</sup> additional expence of this proceeding is charged to the account of him, who applies for it, and he is not to be allowed it in costs, tho he succeeds, unless the judge certify in open court, that it was a cause proper to be tried by a special jury. Special<sup>h</sup>

<sup>f</sup> St. 4 A. c. 16. § 8. & 3 G. II. c. 25. § 14. made perpetual by 6 G. II. c. 37.

<sup>g</sup> St. 24 G. II. c. 18. § 1.

<sup>h</sup> St. 3 G. II. c. 25. § 15,

juries are also allowed in trials of indictments and informations for any misdemeanor, (that is an offence less than felony) and informations in the nature of a *quo warranto*, on motion made either on behalf of the crown, or any prosecutor, or defendant.

When a cause comes on to be tried, the *impanelling* of the jury first engages our attention. By the statute 4 A. c. 16, juries are to be awarded out of the body of the respective county, without regard had as formerly to the hundred or neighbourhood, where the cause arises; but this is not to extend to any criminal prosecution, nor to any action or information on a penal statute. By this act, the old *challenge*, or objection, to the jury, *for defect of hundredors*, is abolished in many trials, and in the rest may perhaps be considered as obsolete. But challenges are still of two sorts, either to the whole *array and panel* of the jurors indiscriminately, or to the *polls*, that is, to certain individuals. It is not consistent with the bounds of this lecture to enumerate the several grounds of exception, that fall under each division. The most common cause of challenge is that of  
being

being interested. The smallest degree of interest in the question depending is a decisive objection to a witness, and much more to jurors; which is a challenge to the polls; if such interestedness is imputed to the officer, by whom the jury is returned, it is a challenge to the array. This principle was strongly recognized in a modern<sup>1</sup> case, which was an action

<sup>1</sup> Burr. 1856.—As sir James Burrow has not given the record at length, I have set down the form of these challenges (which is not of every day's experience) from my MS. precedents.—“And hereupon the said S. B. prayeth judgment of the pannel aforesaid, because he says that the said pannel was arrayed and made by J. C. and J. D. sheriffs of the said city of Chester; and that the said J. C. and J. D. were at the time of the making of the pannel aforesaid, and continually from thenceforth hitherto have been and still are citizens and freemen of the said city of Chester: and this the said S. B. is ready to verify. Wherefore he prays judgment, and that the pannel aforesaid may be quashed. And the said P. E. and H. H. say that the matter in the aforesaid challenge to the array of the said pannel contained is not sufficient in law to quash the array of the said pannel: and this they are ready to verify. Wherefore they pray judgment, and that the array of the said pannel may be allowed by the court here. And the said S. saith for that he hath above alleged a sufficient challenge to quash the array of the pannel aforesaid, which he is ready to verify, which said challenge the said P. and H. do not, nor doth either of them, deny, nor to the same in any wise answer, but do, and each of them doth, altogether refuse to admit that averment, he the said S. prays judgment, and that the array of that pannel may be quashed. And hereupon it is judicially taken notice of by the said court here, and is known to the same court, that by the custom and constitution thereof, and of the city aforesaid, no person or persons can or ought to array the pannel of any jury within the jurisdiction of the said court, or in any civil suit within the same city, other than

action of debt to recover the penalty of a by-law, calculated to exclude strangers from trafficking in the city of Chester. This by-law limited the cause to be tried before the local jurisdiction there; one third of the penalty was allotted to poor prisoners, one other third to the informer, and the remaining third was not subject to any particular disposition. The array was challenged, because the local sheriffs, who impannelled it, were citizens and free-

than the sheriffs of the same city for the time being, or one of them, or (by reason of any default in the said sheriffs) the coroners of the said city for the time being, or one of them; and that by the custom of the said city, from time immemorial, no person or persons can or ought to be sheriffs or coroners of, or within, the said city, but citizens and freemen of the same city. And now all and singular the matters aforesaid, whereof the said parties have above put themselves upon the judgment of the said court here, having been seen, and fully understood, by the same court, it appeareth to the same court here, that the matter contained in the aforesaid challenge to the array of the said pannel, is not sufficient in law to quash the said array of the pannel aforesaid. Therefore it is considered, by the said court here, that the said challenge of the aforesaid S. to the said array of the said pannel be disallowed; and that the said pannel of the aforesaid jury, so arrayed as aforesaid, be allowed and taken. And hereupon the said S. B. *ore tenus* in open court challengeth the polls, because he says, that the jurors, above named, are citizens and freemen, and each of them is a citizen and freeman of the said city of Chester. Which said challenge by the court here is disallowed. And hereupon the said jurors," &c.

N. B. This challenge *ore tenus* was omitted in the first engrossment of this record; on which the defendant *alleged diminution*; and this challenge *ore tenus* was then inserted &c. by rule.

men

men of Chester; and the polls were challenged, because the jurors were also freemen. These objections were overruled in the portmote court of that city; but that judgment was reversed in the great sessions holden for the county palatine, and that reversal affirmed in the king's bench. For there was an undue bias on the minds of the sheriffs and jurors challenged, by reason of such interest as aforesaid,

Where no challenge is taken either to the whole array, or to the jurors individually, twelve of them are sworn to "well and truly try the issue joined between the parties, and a true *verdict* to give according to the evidence." Verdicts are either *general* or *special*. A general verdict for the plaintiff may not only<sup>k</sup> aid a defective or informal declaration, but also in some cases a misjoining of the issue. So likewise<sup>l</sup> in some instances, that is to a certain extent of defectiveness, an informal plea in bar or replication may be aided by a verdict. And<sup>m</sup> where several issues are joined in trespass, some of which are found

<sup>k</sup> T. Raym. 458. 2 Lev. 135. Str. 973. See Burr. 924 &c. 1 Durnf. & East 141 &c.

<sup>l</sup> 1 Cro. (458) 2 Cro. 44.

<sup>m</sup> 2 Durnf. & East 758, 9.

for the plaintiff, and a verdict for the defendant on a justification bad in law, the court will set aside the verdict on that issue, and order a verdict to be entered thereon for the plaintiff, with nominal damages.

A *special*<sup>a</sup> verdict is when the jury find the special matter at large, and refer the result thereof to the court. The court<sup>c</sup> cannot refuse a special verdict, if it be pertinent to the matter put in issue. And such special verdict may find the facts, judged to be of importance, and even<sup>p</sup> private acts of parliament, and other matters of record. For<sup>q</sup> the whole case must appear on the special verdict. If a<sup>r</sup> verdict find part only of the issue, it is insufficient for the whole. But if it contain the substance of the issue, it shall not be set aside for defectiveness; and if it comprehend more than the issue, the surplusage will not vitiate. A verdict however may be objected to and rendered void for uncertainty, for repugnancy, and for want of<sup>s</sup> positiveness, as

<sup>a</sup> 1 Inst. 226. b. St. Westm. 2. 13 E. I. c. 30. § 2.

<sup>c</sup> 1 Inst. 228. a. <sup>p</sup> Hob. 227.

<sup>q</sup> 2 Durnf. & East 666. <sup>r</sup> 1 Inst. 227. a.

<sup>s</sup> See the observations of the court on the special verdict in murder, Lord Raym. 1574 &c.

if it specify grounds for inference only and implication. But I forbear to enlarge on these points, partly because such objections are unlikely to recur. If 'the verdict be insufficient in civil' suits, and no judgment given, the cause must be re-tried by means of a *venire facias de novo*: if judgment have been given, it shall be reversed.

When a considerable legal doubt arises at the trial, it is frequently the modern course, instead of a special verdict, to have a *special case* stated under the direction of the judge, and the advocates on both sides, for the opinion of the superior court at Westminster, in which the cause began. This does not constitute a part of the record; and it is attended with less expence than the finding of a special verdict. But on the other hand, it cannot, like the latter, be removed from court to court, by writ of error, so as finally to await the determination of the lords in parliament.

I proceed now to the ordinary method of

<sup>c</sup> Lord Raym. 1521, 2.

<sup>u</sup> In capital prosecutions also the same rule seems to obtain; (Lord Raym. 1584, 5.)

impeaching

impeaching former verdicts, and which of late years has occupied a considerable portion of the attention of the superior courts, I mean *motions for new trials*. The antiquity of granting new trials is thought<sup>\*</sup> to appear from this, that it is a good cause of challenge against a juror to allege, that he was a juror before in the same cause: and the practice is said to be founded on trials at the assizes being a subordinate mode of investigating matters in litigation, introduced by the statute<sup>†</sup> of Westminster the second, for causes, “*in quibus facilis est examinatio*.” The<sup>‡</sup> reason, why the practice of granting new trials cannot be traced farther back than the latter end of Charles the first's reign, is because it is not the course of the old report books to give an account of determinations of the courts upon motions.

A party<sup>a</sup> cannot move at the same time for a new trial, and also in arrest of judgment; nor can he move in arrest of judgment first, and for a new trial afterwards; but he must begin with his motion for a new trial; which is regularly to be made

<sup>\*</sup> 2 Sal. 648.<sup>†</sup> 13 E. I. c. 30.<sup>‡</sup> Burr. 394.<sup>a</sup> Burr. 334. 2 Sal. 647.

within

within the first four days of the term following the verdict.

The grounds of granting new trials are very various; as, first, where there is any misconduct in the jurors, or reason to suspect their indifferency. Thus <sup>b</sup> a new trial was granted, the foreman having declared, that the plaintiff should never have a verdict, whatever witnesses he produced. In a <sup>c</sup> cause, in which the duke of Leeds, being father of the plaintiff, had written to the jurymen, desiring their attendance, a new trial was moved for, but refused, because there was timely notice of the letter, and the other side would have consented to a trial at bar. And where a party has a cause of challenge to a juror, and neglects it, this will not be a ground for a new trial: otherwise, if he have not timely notice of such cause of challenge. In this case, justice Powell mentioned an instance, where a letter was written to a jurymen, to consider the plaintiff was a poor man, for which a new trial was granted, and the writer committed. And chief justice Holt, in de-

<sup>b</sup> 2 Sal. 645.

<sup>c</sup> 11 Mod. 118, 9.

livering his opinion, cited a case in Edward the third's time, where a new trial was granted, because a great lord, concerned in the cause, sat upon the bench at the trial. So where <sup>d</sup> the jury drew lots for whom they should find, a new trial was granted, for it is of ill example. This <sup>e</sup> point is said to have been formerly determined twice for, and twice against, such motion; but it is very extraordinary, that any doubt should be conceived concerning the propriety of referring solemn matters of legal discussion to the decision of chance.—A new trial may also be granted for the <sup>f</sup> misdirection or errors of the judge, who tried it, as in improperly receiving, or rejecting, evidence. Yet <sup>g</sup> if the supposed misdirection be a technical objection in point of law, and substantial justice be done, or, generally, if the merits have been fairly and fully tried, a new trial will not be granted; for the application is to the discretion of the court. But the granting of this motion most frequently depends on the judge's <sup>h</sup> certificate,

<sup>d</sup> Str. 642. Bunb. 51.

<sup>e</sup> Comb. 14. 1 Keb. 811.

<sup>f</sup> 2 Sal. 649.

<sup>g</sup> 2 Durnf. & East 4, 5. 3 Will. 273.

<sup>h</sup> See Rep. B. R. Hardw. 23.

giving a narrative of the former trial; as if it appear on his state of it, that the verdict was against evidence, or that the damages were excessive, tho the court is very scrupulous of seeming to interfere with the <sup>i</sup> province of the jury on this latter ground, especially in actions for torts, where there is no regular measure for damages, as there is in matters of contract and account. On the other hand, verdicts will never perhaps be frustrated, for the <sup>k</sup> smallness of the damages, and rarely, if ever, <sup>l</sup> where there has been a finding for the defendant, the action being in either instance founded on a tort.

A <sup>m</sup> new trial may be granted, where a party is disappointed, by sickness or the like, of the attendance of a material witness, or upon a discovery of fresh and important evidence. But a voluntary defect of preparation, or <sup>n</sup> a mistake in conducting the cause, or the want of such evidence or <sup>o</sup> defence as it was

<sup>i</sup> See Cowp. 230, 1. 1 Durnf. & East 277. Black. 942, 3. 1327 &c. 4 Durnf. & East 651 &c.

<sup>k</sup> Barnes 445, 6. <sup>l</sup> Black. 851. Cowp. 37.

<sup>m</sup> Prec. ch. 194. 2 Sal. 647. 653. 6 Mod. 22. 1 Will. 98. Fitzgib. 40. Str. 691.

<sup>n</sup> 2 Durnf. & East 120.

<sup>o</sup> 1 Durnf. & East 84 &c.

in the party's power to have produced at the former trial, or <sup>p</sup> a discovery of the incompetence of the witnesses examined, are not substantive reasons for defeating the present effect of the standing verdict. Neither are <sup>q</sup> the value and importance of the question, unless it be involved in some degree of perplexity and doubt.——Lastly, it must be observed, that in the case of an issue directed by a court of equity, the motion for a new trial must be made before that jurisdiction.

Of late <sup>r</sup> years our superior courts have gone more liberally into the granting of new trials, according to the circumstances of the respective cases. They have abated also of the rigor of former precedents, in granting them in ejectment, as well as in other actions, upon proper grounds; in an <sup>s</sup> information in the nature of a *quo warranto*, such pro-

<sup>p</sup> 2 Durnf. & East 717 &c.

<sup>q</sup> 2 Durnf. & East 113 &c.

<sup>r</sup> Burr. 292. 395. 2108. 2224. 2 Durnf. & East 120.—  
But a new trial will rarely, if ever, be granted, after a trial at bar in a writ of right: the law has made this conclusive: and as the practice of granting new trials has been chiefly taken up since the disuse of *attaints*, and it is pretty clear, that no attaint lay in such case, this has been argued as an additional objection. (Black. 941, 2.)

<sup>s</sup> 2 Durnf. & East 484.

ceeding being now considered in the light of a civil suit; in granting them also after a trial at bar, and even after two concurring verdicts. But it<sup>u</sup> still seems an invariable objection against sending a cause to be considered by a second jury, where a verdict has been for a defendant, in an action on a penal statute, the jury having formed an opinion on the whole case: tho<sup>x</sup> even in such action, a new trial may be granted, where the verdict has proceeded on the mistake of the judge. Regularly costs are to be paid to the party in possession of the verdict. But in<sup>y</sup> some cases a new trial will be granted even without payment of costs.

Within the time limited for moving for a new trial, the defendant may *move in arrest of the final judgment*. This application must be grounded on the insufficiency of the declaration, or other matter, apparent on the record.

If neither of these motions be made or granted, *final judgment* is entered; which, as

\* 3 Will. 59, 60.

x 4 Durnf. & East 753 &c.

y Burr. 393, 4. 1216. Str. 642. 3 Will. 146, 7. 338.

we have before seen, varies in its form, according to the particular kind of action, to which it is adapted. There are also, in different stages of the suit, opportunities given of entering divers sorts of *interlocutory judgments*, as, against *the plaintiff* for default of filing a declaration or replication in due time, according to the rules of practice. This is one species of *nonsuit*. The plaintiff may likewise at the trial, (on the discovery of a material error or defect in the proceedings, or his inability to give evidence of some important point) voluntarily submit to be nonsuited, rather than have a verdict against him: for<sup>2</sup> he may begin the same suit again.

There

\* 1 Inst. 139. a.—If a man mistake his declaration, and the defendant demur, there is no question, but that the plaintiff may set it right in a second action. But if a declaration be faulty, and the defendant plead in bar, and obtain a verdict, the plaintiff, it is said, shall never bring his action about again: or suppose such a plaintiff demur to the plea in bar, this confesses the fact, if well pleaded, and estops him as much as a verdict. (1 Mod. 207.) An action of covenant was brought, and there was a fault in the declaration in not assigning a good breach, whereupon there was a demurrer, and judgment for the defendant. Afterwards the plaintiff brought another action for the same matter, and assigned the breach properly: the defendant pleaded in bar the former action, and that it was barred by the judgment on the demurrer; the plaintiff replied, that the judgment was not given upon the merits of the cause; the defendant demurred, and judgment was pronounced for the plaintiff. (2 Lil. pract. reg. 107.) To understand and reconcile these authorities, it must

There may also be an interlocutory judgment against the *defendant*, by reason of his default or omission, or (which is more unusual) his express acknowledgment on record of the action, or upon demurrer. But such interlocutory judgment will not intitle the plaintiff to the whole amount of the damages laid in his declaration; and at the same time it being unknown, what damage he has really incurred, or ought to be compensated, it becomes necessary to award what is called a *writ of inquiry*. This is a process empowering and directing the sheriff to inquire by the oaths and verdict of a jury, what damage the plaintiff hath sustained. And it resembles a trial of the issue, except that it is more confined in the object of examination. Thus<sup>a</sup> if a writ of inquiry issue (upon confession of the action) in trespass for taking goods, the plaintiff need not prove the property of the goods, but only their value. In<sup>b</sup> an action on a bill of exchange, the necessary proof is still more curtailed. For as the bill is set forth on the

be observed, that in the latter instance, the defendant must have failed of the *identity of the record*, to which his plea must have referred. The good and bad assignment of the breach of covenant could not be averred to be both for the *same* cause of action.

<sup>a</sup> Yel. 152.

<sup>b</sup> 3 Durnf. & East 302, 3.

record, the defendant, by letting judgment go by default, admits, that he is indebted to such an amount; and tho the bill must be produced before the jury on the writ of inquiry, it need not be proved; the only use of producing it is to shew that no part of it has been paid. But sometimes a writ of inquiry is needless; as, where to save charges, the defendant acknowledges, not the right of action only, but damages also to a particular amount, which the plaintiff agrees to take. In an action of debt likewise, where the chief object of the suit is generally a specific sum, and not uncertain damages to be assessed by a verdict, it seems to be the course, on a judgment for the plaintiff by confession, default, or on demurrer, not to issue a writ of inquiry, but for the court to award the debt itself, and also to assess, by the plaintiff's assent, a small sum of money to him, as damages incurred by reason of the detention of the debt sued for.

If either party be dissatisfied with the judgment of the court, pronounced either on a demurrer, or on a motion in arrest of judg-

1 Sid. 442. 1 R. A. 579. 2 Saund. 107.

ment, (which, as already mentioned, must relate to a matter apparent on the face of the record) the record may be removed, *by writ of error*, into a superior tribunal, in order to the reversal or affirmance of the former judgment. The record <sup>d</sup> itself, not a transcript of it, must be removed into the superior court, as from the common pleas into the king's bench. In treating of jurisdictions, I have <sup>e</sup> formerly noticed the several courts appointed successively to redress the errors of inferior tribunals. When the <sup>f</sup> record is so removed, the plaintiff ought in the same term to *assign* the errors. The *general assignment* of error is "that by the record it appears, that the judgment was given for A. B. (the defendant in error) against C. D. (the plaintiff in error) whereas by the law of the land it ought to have been given for the said C. D. against the said A. B, therefore in that there is manifest error," or to the like effect. But there may also be <sup>g</sup> a *special* assignment of error, stating the particulars intended to be relied on; and in either case, the adverse party puts in an

<sup>d</sup> F. N. B. 45. 1 R. A. 752. 2 Saund. 254. See Bunb. 69. But as to the house of lords, see Vol. I. 224, 5.

<sup>e</sup> Lect. VIII.

<sup>f</sup> F. N. B. 46. Lut. 854.

<sup>g</sup> See F. N. B. 45.

answer,

answer, or *joinder in error*, in this form, viz. “that there is no error in the record or proceedings, or in the giving of judgment.” If<sup>a</sup> a former judgment for the plaintiff be affirmed, *costs* are to be awarded for delay of *execution*: if it be reversed, the court, who reverse it, shall in general give the same judgment as the inferior court ought at first to have given.

When a judgment remains in full force, and there is no writ of error depending, the plaintiff, who has obtained such judgment, may avail himself of the benefit of it, by suing out *execution*. This is called the end and effect of legal judgments. In<sup>i</sup> real actions, the execution pursues the form of the judgment; a writ being awarded to the sheriff, called “*habere facias seisinam*:” in ejectment, the writ is “*habere facias possessionem*.” In<sup>k</sup> personal actions there are several modes of suing out execution for satisfaction of the debt, damages and costs, and directed against the person of the defendant, subjecting him to imprisonment, or against his lands, or per-

<sup>a</sup> 2 Saund. 225. 256. 4 Mod. 127. 2 Sal. 401. Vol. I. 227, 8. & n.      <sup>i</sup> Vol. II. 23.      <sup>k</sup> Vol. II. 43.

sonal effects, or consolidating some of these different objects, in the same process; of all which Sir William Blackstone<sup>1</sup> has displayed a clear and full account.

If execution be not sued out for a year and a day after the judgment, it is necessary to have a *scire facias*, (a judicial writ so called) requiring the sheriff to warn the defendant to shew cause, why execution should not be had against him. The *scire facias* recites the cause of suit, and the former proceedings; and<sup>m</sup> as the defendant may plead to it, it is in the nature of an action. A<sup>n</sup> *scire facias* lies of course within seven years after judgment; after that period there must be a motion at the *fade bar*, as it is called; but after ten years, it must be upon motion in court. Where<sup>o</sup> a plaintiff recovers judgment, and pending a writ of error becomes a bankrupt, the assignees should go on with the writ of error in the bankrupt's name till judgment, and then sue their *scire facias*. If<sup>p</sup> the plaintiff or defendant *die within* a year and a day,

<sup>1</sup> Black. comm. b. iii. c. 26.

<sup>m</sup> 1 Inst. 290. b. See 1 Durnf. & East 389. 2 Durnf. & East 46.

<sup>n</sup> 2 Sal. 598.

<sup>o</sup> 1 Durnf. & East 463.

<sup>p</sup> 1 R. A. 900.

there

there cannot be execution taken out without a *scire facias*, by or against the executor or administrator. But if<sup>a</sup> there be two plaintiffs, and one die after judgment, there seems no necessity for a *scire facias* within the year and day. The judgment in a *scire facias* may be by default, or after an appearance and defence made, in the same manner as in the original action.

I have now enumerated the principal incidents before, at, and after trials by jury, having sought rather to class and distribute them in a perspicuous and methodical arrangement, according to the order of time, in which they arise, than to give a very particular detail of subjects, of which practical experience and a perusal of the forms at large (a course much to be recommended) are the properest methods of attaining a perfect knowledge.

Having thus finished our inquiries into the nature of Private Civil Actions, the second general head of this part of our course, I shall next direct your attention to Courts of Equity.

<sup>a</sup> Noy. 150. 1 Sho. 404. 7 Mod. 68. Mo. 367. 1 Att. Pr. K. B. 386. St. 8 & 9 W. III. c. 11. § 7.

The following lecture will treat of the practical proceedings in those courts, and in the remaining lectures of the course will be selected certain suits, and causes of litigation, adapted to those jurisdictions, and tending to display the system of equitable jurisprudence, established in this country.

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PART THE THIRD.

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DIVISION THE THIRD.

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LECTURE LV.

*Of the practical proceedings in courts of equity.*

I HAVE formerly<sup>\*</sup> attempted to give a historical account of the establishment of the equitable jurisdiction in chancery, and to mark out, in some measure, the difference between courts of law and equity, as distinguished from each other by the juridical constitution of this country. The *practical manner* of suing for, and obtaining, relief in courts of equity will employ our attention in the present lecture. In the remaining part of the course, I shall treat of some of those subjects

<sup>\*</sup> Lect. VI. & VII.

of litigation, which are most frequently adduced before these tribunals. The two principal courts of equity, the chancery and exchequer, agree, not only in their systematic principles, but in the general outlines of their practice; I shall allude to some variances, in the latter respect, between them; but I shall not pretend minutely to expatiate on matters, the knowledge of which must be acquired by long habit and experience.

I must premise, that there are twelve officers of distinguished rank and high antiquity, called "masters in chancery," (including<sup>b</sup> the master of the rolls and the accountant general) and who<sup>c</sup> were, in early times, employed in preparing the form of writs, that court being stiled *officina brevium*. They now administer oaths, take affidavits and acknowledgments of deeds, and<sup>d</sup> a recognizance acknowledged before one of them, certified under his hand, and duly inrolled, becomes a record. But their<sup>e</sup> chief occupation arises upon *references* made to them for liquidating accounts, taxing bills of costs, considering

<sup>b</sup> Vol. I. 165, 6. n.<sup>c</sup> St. Westm. 2. 13 Ed. I. c. 24. § 2.<sup>d</sup> 1 Wms. 334 &c.<sup>e</sup> Pract. reg. ch. 305.

bills and answers objected to for scandal and impertinence, and answers excepted to for defectiveness, receiving proposals for a settlement in contemplation of, or subsequent to, a marriage, determining whether a good title can be made to an estate, and ascertaining, for the ease of the court, other like matters, prolix perhaps in the inquiry, and which might hinder and delay the dispatch of more difficult matters of litigation. On these occasions, they make their certificate or *report*; which, upon motion, may be confirmed, altered, ordered to be reviewed, or set aside, by the court.—The greater part of the business, with which they are conversant in chancery, is, in the exchequer, transacted by an officer called “the deputy remembrancer.” But exceptions for the defectiveness of an answer, are, according to the practice of the exchequer, in the first instance, debated in open court.

The commencement of a suit in equity is by filing *a bill of complaint*; which is in the form of a petition, directed<sup>f</sup> and addressed to the lord chancellor, lord keeper, or lords

<sup>f</sup> Pract. reg. ch. 24.

commissioners,

commissioners, of the great seal, by their names and titles; and during a vacancy, whilst the seal is in the king's hands, "to the king's most excellent majesty in his court of chancery."——In the exchequer, a bill is directed to the chancellor and lord chief baron of that court, naming them, and the rest of the barons there.

The parts of a bill in equity are, according to chief baron Gilbert<sup>c</sup>, derived to us from the antient civilians. It is usually<sup>b</sup> in the following form. After the abovementioned inscription or address, it begins with the words, "Humbly complaining sheweth &c," and then *states* a narrative of the plaintiff's case, expressing the particular acts injuriously done or omitted by the defendant, suggesting divers *pretences* as set up by him in his vindication, and *charging* that such pretences are void of truth and foundation, thus meaning to anticipate the adverse allegations, and to obviate their force and effect. The defendant is then required to answer the premises upon oath,

<sup>c</sup> For. Roman. c. 4.——The treatises of that great man appear like original sketches, and not intended for publication in their present incorrect state.

<sup>b</sup> See Mitf. plead. ch. 41—46. (2 ed.)

not only according to the best and utmost of his knowledge, but also of his remembrance, information, and belief: and here the substance of all the preceding assertions is thrown into the shape of *interrogations*. This interrogatory part is followed by the *prayer*; which usually seeks both specific and general relief; viz. that certain things, therein expressed, may be decreed, and that the plaintiff "may have such farther and other relief as [to [the court]] shall seem meet and his case may require."

Whether there is one or more defendants specially named, the bill, in general, states<sup>i</sup> combination and confederacy; which probably was originally introduced to raise the compassion of the court, and to countenance its jurisdiction in relieving against the extraordinary hardship of conspired injustice and oppression.

By the standing orders of the court, bills ought to be framed succinctly, and not filled with literal or verbose recitals; notwithstanding which, they are usually spun out to a very needless prolixity.

<sup>i</sup> See Mitf. plead. ch. 40. (2 ed.)

The bill must make all *proper parties*, plaintiffs or defendants, to the suit. The<sup>k</sup> king may sue in chancery for equity; and so<sup>l</sup> may the chancellor himself; but he cannot make a decree in his own cause. Thus<sup>m</sup> the lord keeper being a complainant, the master of the rolls and one of the chief justices sat for him. For all persons interested are necessary parties to be brought before the court. The<sup>n</sup> judicial expositions of this rule, are very numerous, and not easy to be reduced to general principles or grounds.

The matter of the bill need not be set forth with that decisive and categorical certainty, which is requisite in pleadings at common law. Thus part of the allegations in the bill may be in the *disjunctive*; for<sup>o</sup> sometimes a *discovery* of the truth is the complainant's principal aim, the rest following of course. Indeed a bill may be brought for a discovery *only*, seeking no further relief in this court: and<sup>p</sup> then it cannot be dismissed *for*

<sup>k</sup> 1 R. A. 373.<sup>l</sup> Ibid.<sup>m</sup> 1 Vern. 139.<sup>n</sup> See 1 Bro. 101 &c. and n. 303. 3 Wms. 311. n. Mitf. plead. ch. 144, 5, 6. (2 ed.) 3 Bro. 228. and 229.<sup>o</sup> See 1 Vern. 219, 220.<sup>p</sup> 1 Atk. 286.

want of prosecution; but the defendant may have an order of court for payment of his costs.

There<sup>a</sup> is nothing irregular in a complainant's bringing a bill with two different *aspects*, or grounds of seeking the relief prayed; that if one fail, the other may answer the intended purpose. But<sup>r</sup> if *two bills* be brought against the same defendant for the same cause, and *reported* so to be on a reference to a master of the court, one of them will be dismissed with costs.

The decree is to be pronounced *secundum allegata et probata*; and therefore it is not sufficient for a plaintiff to give evidence of the facts necessary to support his case, but he must set forth and charge them in his bill; that the adverse party may be apprised against what suggestions he is to prepare his defence. But<sup>s</sup> a charge in general terms, where it is the point, on which the merits of the cause turn, and does not come in collaterally and incidentally, will warrant the production of evidence to particular facts.

<sup>a</sup> 2 Atk. 325. Mitf. plead. ch. 39. (2 ed.)

<sup>r</sup> Pract. reg. ch. 26.

<sup>s</sup> 2 Atk. 333—340.

The prayer of the bill is what demands most consideration and attention. An' accurate specification of the matters to be decreed, in complicated cases, tho brought amicably before the court, requires great discernment and experience. In all suits, however, specific, as well as general, relief is now rarely, if ever, omitted to be prayed: altho it has been said<sup>u</sup>, that the bill may pray general relief only, and at the hearing, particular redress may be sought, agreeable to the case stated, but not different from it. As if the bill be for a rent-charge out of land, the plaintiff, at the hearing, cannot drop this demand, and insist on the land itself. So in a late<sup>v</sup> case, where a bill was brought for a partition, one question was, whether an *account* could be decreed of the rents and profits, under the prayer of general relief. The objection to it was, that there might be a surprise on defendants, and a decree made of

<sup>u</sup> The most exact delineation of very various and proper relief, which ever fell under my observation, was in a cause of *Duncombe, an infant, v. Dolben and others*, decreed in chancery T. T. 1790; but the prayer, with a prefatory explanation, is too long to be here inserted.

<sup>v</sup> 2 Atk. 3. 141. 2 Mod. 91.

<sup>v</sup> *Hales v. Farmer* in chancery, E. T. 1773.

matters,

matters, to which they had no opportunity of preparing a defence. But upon reading some *charges* in the bill, which were very full, of one of the defendant's being in possession of the premises, and receiving the rents and profits, and refusing to account, the court thought, in this case, there could be no such surprise, and accordingly decreed an account. On the other hand, where<sup>w</sup> such specific relief has been particularly prayed, as was improper to be granted, the cause stood over, the plaintiff paying the costs of the day, in order that his bill might be amended, by striking out or correcting the objectionable passages.

A bill may also have faults, which a defendant may object to in the *first stages* of the cause. For if it contain matter *criminal and scandalous*, or *not pertinent* to the subject of litigation, such parts, on a reference to a master of the court, will be expunged, with costs to the party grieved. Nothing<sup>x</sup> relevant to the merits can well be deemed scandalous, any more than impertinent. If a<sup>y</sup> bill be reported scandalous, it must be impertinent of course and necessity. But it is very obvious, that it

<sup>w</sup> 2 Atk. 3.

<sup>x</sup> 2 Vez. 24.

<sup>y</sup> Ibid.

may be impertinent, without containing matter of scandal. A <sup>z</sup> bill cannot be referred for impertinence, after the defendant has answered, or submitted to answer : but for scandal it may be referred at any time.

These considerations may remind us of the power of *amending* <sup>a</sup> the bill ; which may be done by motion, and order of court, repeatedly, and both in the allegations, and in the prayer of relief. But <sup>b</sup> after the time for breaking open the seal of the depositions, (which is called *passing publication*) it is too late for the plaintiff to amend his bill, without withdrawing his replication, throwing his cause back to such former stage of it. And <sup>c</sup> after the cause is set down for hearing, the only allowable kind of amendment, that can then be made, is by adding new and proper parties ; new charges cannot be in-

<sup>z</sup> 2 Vez. 24. and 631. Bunb. 304.

<sup>a</sup> See 2 Atk. 123. 218. The *amended* bill then becomes the bill before the court. But new process does not issue, unless the plaintiff requires, as he usually does, a farther answer to the amended bill. Yet the defendant may answer it, tho not required so to do, if his interest be affected (2 Bro. 619.) If the amendments, in any one place, do not amount to two chancery sheets, (viz. of ninety words each) they may be inserted without ingrossing the bill anew, in order to save expence.

<sup>b</sup> : Atk. 51.

<sup>c</sup> 3 Atk. 371.

troduced,

roduced, or a material fact put in issue, at this stage of the cause; that is to say, without a special case laid before the court in support of such application.

It is a rule also, that <sup>d</sup> matter, subsequent to the original bill, cannot come in by way of amendment: but the complainant must file a *supplemental bill*, as it is called, making the same parties defendants, as were so in the former stage of the suit. On the other hand, matter, prior to the filing of the original bill, is not properly *supplemental*. It should be consolidated with the other matters in the form of an *amended bill*.

It is frequent for a defendant to become a plaintiff in his turn by filing a <sup>e</sup> *cross bill*, seeking discovery, or discovery and relief. Such <sup>f</sup> cross bill may merely resist the claims of the original plaintiff; or it may raise new and adverse claims, essential to a full and equitable determination of the matters in controversy.

The nature of *bills of interpleader* is best

<sup>d</sup> 1 Atk. 291. 3 Atk. 217.

<sup>e</sup> See Mosel. 382.

<sup>f</sup> Mitf. plead. ch. 75, 76. (2 ed.)

conceived by examples. If <sup>g</sup> two persons, for instance, claim rent from the same tenant, he may exhibit this kind of bill, praying that such claimants may *interplead* for ascertaining the right in question, bring his rent into court, and thus provide for his own security. It is the <sup>h</sup> same of any other debt or duty, where the rightful owner of two claimants is unknown; as if two persons insist on different titles, by will or otherwise, to the money secured by a mortgage, the mortgagor or his heir, willing to redeem, may pray, that they may interplead. Bills <sup>i</sup> of interpleader must be accompanied with an affidavit, that the plaintiff does not collude with any of the other parties; the want of which affidavit is ground of demurrer.

A *certiorari* <sup>k</sup> bill is such whereby a special writ of certiorari is prayed for removing a cause from an inferior court, by reason of some stated incompetency or injustice; and

<sup>g</sup> Pract. reg. ch. 38, 39.

<sup>h</sup> 1 Eq. ca. abr. 80. marg. Bunb. 303. See Gilb. For. Roman. c. 4; where a cross bill is compared to the *reconventio*, and a bill of interpleader to the *tertius interveniens*, of the civilians: but neither the character nor the instances, there adduced, of bills of interpleader, exactly correspond with the common description of them. (Mitf. plead. ch. 32. 2 ed.)

<sup>i</sup> Mitf. plead. ch. 126. (2 ed.) See 1 Vez. 248.

<sup>k</sup> Mitf. plead. ch. 49, 50. (2 ed.)

it is proceeded on in the court of chancery as an original bill.

Other bills are spoken of by different denominations, according to their different qualities. Thus we hear of *injunction bills*, (of which I shall speak in the next lecture) of *bills quia timet*, of *bills of peace*, as to prevent a multiplicity of suits, or the like, and of *bills to perpetuate the testimony of witnesses*.

If a suit be abated by the death of the parties, or by the marriage of a female plaintiff, (for<sup>1</sup> it is otherwise where a female defendant marries) it is necessary to file a *bill of revivor* by, or against, the heir, or personal representative of the deceased, or by the husband of the plaintiff so marrying during the litigation. The statute 8 and 9 W. III. c. 11. § 7. seems to speak only of actions at law. But<sup>m</sup> by construction, that act may also prevent the abatement of a suit in equity, by the death of a defendant, provided the subject matter of the bill be not thereby affected. Where likewise a<sup>n</sup> bill is brought by husband

<sup>1</sup> But the name of the husband and wife must be entered in the suit. (1 Vez. 182; see Mitf. plead. ch. 56. n. 2 ed.)

<sup>m</sup> 1 Atk. 291.

<sup>n</sup> 3 Atk. 726.

and

and wife for a demand in her right, and the husband dies, the suit does not abate. An heir or personal representative are the parties regularly intitled to revive a suit. A bill of revivor, strictly so called, cannot be brought by, or against, an assignee, purchaser, or devisee, for want of *privity*, as it is technically expressed: but there may be filed an original bill *in the nature* of a bill of revivor. And if a plaintiff become a lunatic, a supplemental bill may be filed in the joint names of the lunatic himself, and of the committee of his estate, in order to answer the same purpose as a bill of revivor, in procuring the benefit of the former proceedings. In <sup>p</sup> one instance only, a defendant may revive a suit, viz.

• It was so done in *Brown and another v. Clark and others*, in chancery; the supplemental bill filed 21st April 1787, signed by a very eminent draftsman, was brought in the joint names of the lunatic by the committee of his person and estate, and also of the committee; and it stated the former proceedings as of record, and then stated, by way of supplement, the commission, inquisition, and grant of the custody of the lunatic's estate, and that the co-plaintiffs or the committee were intitled to the benefit of the suit &c. and to have the same decree as the lunatic might alone have had, in case he had not become a lunatic; and the bill prayed accordingly, and also general relief, with subpenas to answer, the lunacy having happened before the answers were come in; but nothing of abatement or revivor.—I have stated this matter of form, because it is to be hoped the unhappy occasions of it rarely occur, and consequently are not matters of ordinary experience.

• 3 Atk. 692.

where

where there has been a decree for an account; because in that case he is considered as an actor. If<sup>a</sup> a plaintiff, after an interval of many years, file a bill of revivor, it is liable to be dismissed. But where he is at liberty so to do, he may either file such bill of revivor or an original bill at his election. A bill of revivor must pursue the original bill, briefly stating it, and the proceedings had thereon. And a<sup>s</sup> suit cannot be partially revived, but the answer, and all former proceedings, are to stand revived.

I shall here lastly mention *bills of review*, which<sup>t</sup> have been, but improperly, compared to writs of error at common law. There are<sup>n</sup> two sorts of bills of review, one founded on supposed error appearing in the decree itself, the other on new supplemental matter arising after the decree, or new proof, which could not be used at the hearing; and it must be shewn, that such new matter or proof is material or relevant in the cause. If

<sup>a</sup> 2 Ch. ca. 216.<sup>t</sup> 1 Vern. 463.<sup>s</sup> Pract. reg. ch. 45.<sup>n</sup> 1 R. A. 382.

<sup>2</sup> 2 Atk. 178, 530. 3 Atk. 35. 1 Vez. 430. (See  
<sup>2</sup> Wms. 284 and n. 1. *ibid.* 4 ed. 3 Bro. 639 and n.)  
 a decree

a <sup>v</sup> decree be inrolled, there can neither be a rehearing, nor relief on a new original bill, and the only remedy is by bill of review. And <sup>w</sup> yet a bill may be brought *in the nature* of a bill of review *before* the inrollment of the decree, by leave of the court, for the purpose of introducing the supplemental matter; but the merits of the decree are investigated on a petition of rehearing. On a bill <sup>x</sup> of review, not being of the *supplemental* kind; no objection can be raised to the decree, that is not expressly assigned for error. The last rule, which I shall mention on this head, is, that <sup>y</sup> a second bill of review will not be allowed.

I have before said, that the commencement of a suit in equity is by filing a bill of complaint, because, by the statute <sup>z</sup> for the amendment of the law, no subpoena (which is a writ prayed by the bill, and the ordinary process to compel the defendant to appear and *answer*) is to issue till after the bill is filed with the proper officer of the respective courts of equity.

<sup>v</sup> 3 Wms. 371, 2; and see *ibid.* n. 1 (4 ed.)

<sup>w</sup> 2 Atk. 178. Mitf. plead. ch. 82. (2 ed.)

<sup>x</sup> 4 Vin. abr. 414.

<sup>y</sup> 2 Ch. ca. 133. 1 Vern. 135. 417. 441.

<sup>z</sup> 4 A. c. 16. § 22.

The same statute<sup>a</sup> intitles defendants to full costs where bills in equity are dismissed, either by plaintiffs themselves, or for want of prosecution. If a lord of parliament be defendant, he is not to be served with a subpoena; in the room whereof, a *letter missive* signed by the chancellor is brought to him, requiring him to appear and *answer*: and where the attorney general is a defendant, in order to sustain any rights of the crown, the bills prays, that he, being attended with a copy of the bill, may appear and put in his answer thereto.

But a defendant may *demur*, or *plead*, as well as answer.

1. Want<sup>b</sup> of sufficient parties is cause of *demurrer*, (unless<sup>c</sup> the bill is merely for a discovery) tho the defendant may also take advantage of it at the hearing. A defendant may demur<sup>d</sup> also, where a plaintiff does not in his bill intitle himself to the thing demanded: as if a husband sue alone in his wife's right in cases where she ought to be a party. That indiscriminate expression of "want of equity" seems to include various causes of

<sup>a</sup> § 23.<sup>b</sup> 3 Wms. 331 &c. 2 Atk. 510.<sup>c</sup> Mitf. plead. ch. 163. (2 ed.)<sup>d</sup> 1 Ch. ca. 41.

demurrer,

demurrer, if they were to be specifically enumerated. Originally the <sup>e</sup> expression of a "general demurrer" meant the same in equity as at law, viz. where no cause was alleged; and such were not allowed in practice. But now this indefinite and comprehensive cause of demurring, viz. that the bill contains no equity, gives the denomination of general demurrers in these courts. For, in equity also, the causes of demurring are sometimes more distinctly particularised. The more general form imports, that the plaintiff's remedy, if any, is *wholly* at common law. And <sup>f</sup> if a bill pray relief as well as a discovery, where the plaintiff is intitled in equity to a discovery only, a general demurrer will be allowed. But I do not apprehend it to be any cause of demurrer, that some redress might be sought by action, if it were not attainable with the same certainty and ease, and in the same degree. Many *accounts*, for instance, have been decreed to be taken in equity, which might, especially after a discovery, have been settled before auditors at common law. But the plaintiff being intitled to a discovery, the absurd circuitry

<sup>e</sup> Pract. reg. ch. 133.

<sup>f</sup> 2 Bro. 319. Charles v. Taylum, in the exchequer, 28th July 1791. acc.

is obvious of remitting him to a different tribunal. Thus also, where<sup>g</sup> a curious piece of antiquity, being a silver altar with a Greek dedication to Hercules, was found in a manor in Northumberland, on a bill brought to have it restored undefaced, it was not thought sufficient to allege, that the plaintiff might<sup>h</sup> possibly recover the specific thing in an action of detinue, and the demurrer was overruled. But demurrers are sometimes calculated to avoid a discovery. Thus they<sup>i</sup> are constantly allowed to so much of a bill as seeks a discovery of things, which might subject the defendant to legal punishment or forfeiture. If<sup>k</sup> a demurrer be allowed, it puts an end to the litigation, or to so much of the suit as the demurrer extends to: but if it be<sup>l</sup> overruled, the defendant may insist on the same thing in his answer: in which it differs from a demurrer at law, where it is a conclusive bar.

2. A demurrer in equity differs also from a *plea* in equity; for<sup>m</sup> the latter may be allowed in part, and overruled in part; but of the

<sup>g</sup> 3 Wms. 390, 1.

<sup>h</sup> See ant. 105.

<sup>i</sup> 1 Atk. 450. 2 Atk. 387.

<sup>k</sup> Mitf. plead. ch. 14, 15. (2 ed.)

<sup>l</sup> 2 Atk. 284. <sup>m</sup> Ibid.

former

former it is otherwise. It<sup>n</sup> is<sup>j</sup> more regular and formal to insist upon an objection to the court's want of jurisdiction, by way of plea than of demurrer. An<sup>o</sup> objection from length and lapse of time is not proper matter for a demurrer, but for a plea. The defendant may by plea take advantage of the statute of limitations<sup>p</sup>, where the cause of suit arose above six years ago; or of the statute of frauds<sup>q</sup>, where the bill seeks performance of an agreement by parol, which, according to that law, ought to have been in writing. The<sup>r</sup> latter statute may be pleaded as well in bar to a discovery of the agreement, as to the relief sought. But<sup>s</sup> in pleading the statute of limitations, that there was once a subsisting debt, and the time, when it accrued, must be divulged; tho relief indeed is barred by lapse of time. And<sup>t</sup> if in the case of an agreement, part performance be alleged, or<sup>u</sup>

<sup>n</sup> 1 Atk. 544.<sup>o</sup> 2 Vez. 109.<sup>p</sup> 21 J. I. c. 16.<sup>q</sup> 29 C. II. c. 3.<sup>r</sup> 6 Bro. ca. parl. 45 &c. 2 Bro. 559 &c. <sup>s</sup> 2 Atk. 51.<sup>t</sup> 1 Vern. 472, 3. 2 Bro. 559, 560.

<sup>u</sup> 3 Wms. 143 &c. 3 Atk. 558. Str. 236 &c.—In like manner, if the defendant plead, that he is a *bonâ fide* purchaser for a valuable consideration, and particular instances of fraud be alleged in the bill, they must be noticed by way of answer, that the plaintiff may have liberty to except, it is not sufficient to deny them in the plea. (1 Vern. 185.)

if, in either case, particular instances of fraud be suggested, these matters, it seems, must be answered. It<sup>x</sup> is no plea, that an action at law is depending; for till the defendant has answered, the plaintiff is not bound to make his election, in what court he will proceed. But, it seems<sup>y</sup>, a defendant may plead a suit depending in another court of equity. So, under<sup>z</sup> certain regulations, he may plead a former account stated, or<sup>a</sup> a former decree inrolled.

Several things, which may be the subject of a demurrer, may also afford matter for a plea. Indeed<sup>b</sup> where a bill was brought to redeem a mortgage, and the defendant pleaded possession for thirty years, the plea was allowed, tho it was said, it would have been otherwise in case of a demurrer. But pleas and demurrers in equity have a very close affinity. The original and present distinction seems to be, that pleas set forth some special matter as coming from the defendant, demurrers rely on the insufficiency of the plaintiff's own

<sup>x</sup> 3 Wms. 90.      <sup>y</sup> 3 Atk. 589.

<sup>z</sup> Mitf. plead. ch. 208. (2 ed.)

<sup>a</sup> 3 Atk. 626, 7; and see 1 Vern. 310.

<sup>b</sup> 3 Atk. 225, 6.

shewing, by reason of some impropriety or omission therein. Demurrers therefore are put in without oath; but<sup>c</sup> the defendant is sworn to the truth of his plea, except<sup>d</sup> pleas of matter of record, or *quasi* of record, and such pleas as go to the jurisdiction of the court, or in disability of the parties, analogous to dilatory pleas at common law. The proceedings on both are much the same. It is said in a book of authority<sup>e</sup>, that if, upon argument, a plea or demurrer be allowed, the bill is dismissed; and the plaintiff pays costs. This is true of a *demurrer*. But<sup>f</sup> tho a *plea* be allowed, the bill is not out of court; the plaintiff may reply to the truth of the plea, and put the defendant on proving it. If<sup>g</sup> on the contrary a plea or demurrer be overruled, the defendant must pay costs, and put in his answer, if he have not already so done; whereupon the cause proceeds. If a plea be overruled, it is frequently permitted to stand for an answer with liberty to *except*. Sometimes the benefit of a plea is saved till the hearing; and sometimes a defendant, in his

<sup>c</sup> 2 Ch. ca. 208.

<sup>d</sup> Mitf. plead. ch. 239. (2 ed.) 1 Ch. ca. 237.

<sup>e</sup> Pract. reg. ch. 133, 4.

<sup>f</sup> Gilb. eq. rep. 184. 3 Atk. 226.

<sup>g</sup> Pract. reg. ch. 133. 284.

answer,

answer, insists on the same matter as might have been the subject of a plea, praying he may have the same benefit of it, as if he had pleaded it in bar.

When a defendant *prays time* to <sup>h</sup> answer, the order <sup>i</sup> appoints the specified time, “to plead, answer, or demur, not demurring alone.” An <sup>k</sup> answer to part, and a demurrer to part, of the bill is not a compliance with such order: but it is otherwise of a plea: and after such order, on a special application, leave might be given to demur. The common course is to allow first six weeks to answer, then a month, and then three weeks, when the defendants live in the country, and it is thought advisable to make three several applications for this purpose. Answers, (except when taken in the country by commission) as well as bills, pleas and demurrers are to be

<sup>h</sup> The court will order the plaintiff to give security for costs, when it *appears* (3 Bro. 371.) that he resides abroad. *Aliter* if the defendant have answered, which is a waiver. In a case anon. M.T. 1771, the plaintiff had excepted to the answer, and the defendant's counsel was ready to give it up, and urged that it was no answer, offering to produce the master's certificate allowing the exceptions. But the master of the rolls refused the motion; for it is an answer *quoad* this purpose.

A foreigner may put in an answer in his own language; but a sworn translation must be filed with it. (3 Bro. 263.)

<sup>i</sup> See Mitf. plead. ch. 170. (2 ed.) <sup>k</sup> 2 Bro. 314. and n.

signed by counsel. An answer<sup>1</sup> may be referred, in the same manner as a bill, for scandal and impertinence. But the most frequent objection to answers is for their defectiveness, as not answering the bill; and thereupon the course is to file *exceptions*, specifying the particulars, which the defendant has omitted to answer.

The practice on *exceptions* differs in the courts of chancery and exchequer. In the former jurisdiction, they are referred to a master of the court, before whom all the exceptions are argued, and some may be allowed, some overruled, and some partly admitted;

<sup>1</sup> In the exchequer M. T. 1772, *De Castro and others, v. Da Costa and others*. The plaintiffs had referred the answers of two of the defendants for impertinence, which were reported impertinent, and now the time for filing exceptions to those answers being elapsed, the plaintiffs had obtained the common order for filing exceptions, *nunc pro tunc*. The defendants gave notice of moving to discharge this order; for that after a reference for impertinence, it was too late to file exceptions; and a late case was mentioned, of *Read v. Arthur*, where the court was said to have compelled the plaintiffs to make an election, whether they would proceed on the reference, or on the exceptions. [*Sed qu.*] By the court, clearly and unanimously, the plaintiffs are intitled to file exceptions. An answer may be both impertinent and insufficient. Mr. Baron Perrott; when it is referred for impertinence, it is not received as an answer. Therefore after the reference is the time for exceptions. Pending the reference, you cannot except. (Mr. Skynner and myself for the plaintiffs, Mr. Perryn and Mr. Chambers for the defendants.)

for which last consideration, it is expedient to make each distinct exception simple and concise. The master's report may be confirmed or varied by the court. But in the exchequer, the exceptions are, in the first instance, argued in open court. Till within a late period, another variance subsisted between the courts. For<sup>m</sup> in the exchequer, as soon as the defendant was found to have put in a defective answer in any particular, the course was to desist from farther inquiry touching the remaining exceptions, which were taken as allowed. But this practice has recently been altered, and no exceptions are now allowed in that court, but upon argument.

If a<sup>n</sup> defendant put in a demurrer or plea to part of a bill, and an insufficient answer to the residue, the plaintiff cannot except, till the demurrer or plea has been argued. Another restriction on filing exceptions is this; a plaintiff cannot amend his bill after the coming in of the defendant's answer, and then, by exceptions, say, that the answer to the original bill was defective. Obtaining an order to amend before exceptions filed is an

<sup>m</sup> 6 Bro. ca. parl. 506. and n.

<sup>n</sup> 3 Wms. 326, 7. and n. 1 Vern. 344.

admission, that the original bill was fully answered. So that, in such case, the exceptions taken must be founded on the amended, and not on the original, parts of the bill.

In arguing exceptions, it is not necessary to penetrate very far into the equity or substantial merits appearing on the face of the bill. For ° generally, if the defendant have submitted to answer, he must answer fully. But the nature of the cause, and the relevancy of the exception, should be, in some measure, displayed. A defendant is not bound to answer an interrogatory, that is not grounded on some charge or assertion in the bill. But where he *is* bound to answer, a general affirmation or negation, or as to his knowledge, will not always avail. For he must answer, if he be so interrogated, particularly, and also as to his remembrance, information and belief.

As an answer is taken upon oath<sup>p</sup> before a master in chancery or commissioners authorised for that purpose, an order to *amend* it

• But see 2 Bro. 252 and 332 &c.

<sup>p</sup> Answers in amicable causes, are sometimes put in without oath by the plaintiff's consent, or on his motion, which latter mode is less expensive.

cannot

cannot be obtained with the same ease as in the case of a bill. The<sup>1</sup> most common instances of amending answers are where, through inadvertency, a defendant has mistaken a fact or a date; there the court will give leave to amend such particulars. But<sup>2</sup> where a defendant referred to marriage articles executed in Spain, which reference made it incumbent on her to produce them, and the custom of Spain being to deposit articles and other deeds in places appointed for that purpose, so that an authenticated copy was all that could be had, the court gave her liberty to amend her answer by setting forth the custom of that kingdom with regard to the depositing of deeds; which was the insertion of a new fact.

The answer of a lord of parliament is put in without oath, on<sup>3</sup> protestation of honor only, but is taken before a master of the court or commissioners, like that of an inferior person. And<sup>4</sup> if a peer be to make an affidavit, to answer interrogatories, (not by way of an-

<sup>1</sup> Bunb. 186. See 2 Wms. 427. and n. 1. (4 ed.)

<sup>2</sup> 2 Atk. 294, 5.

<sup>3</sup> And it may be taken by consent and motion, without protestation of honor, as that of an inferior person without oath.

<sup>4</sup> 1 Wms. 146.

swer to the bill) or to be examined as a witness, he must be sworn.

VIII When the answer is come in, and appears sufficient, the plaintiff should be advised, whether he can properly proceed to a hearing of the cause on the bill and answer only, without other proof than the discovery made by the defendant, and can obtain that relief, which is the object of the suit. In such case, the answer will, at the hearing, be admitted true in every point. If the plaintiff mean to *contest* the facts in the answer, he must file a *replication*, in a general and succinct form, averring and affirming the bill to be true. Likewise if the defendant by his answer swear, "he believes and hopes to prove, that the plaintiff is satisfied his demand," or the like, and the cause be heard on bill and answer, the bill is liable to be dismissed: for the plaintiff *ought to have replied*, otherwise the defendant is precluded from adducing his proffered evidence: however a cause so circumstanced stood over, and the plaintiff had leave to reply on payment of costs. IX. To the plaintiff's replication the defendant is to *rejoin*, and thus the cause is at issue; tho

it has formerly been said<sup>x</sup>, that the pleadings may extend farther, to a surrejoinder and rebutter, as at common law; which must have been when special replications were in use,

The next thing is the *examination of witnesses*, as to whose admissibility<sup>y</sup> the rules are the same as at law. For this purpose, a *commission* is applied for, and *interrogatories* are prepared, signed by counsel, tending either to prove particular facts, or the authenticity of such written evidence and *exhibits* as may be available in the cause. A day is then fixed (which may afterwards, on motion, be enlarged) for *passing publication*; which (as above intimated) gives the liberty of inspecting and copying the depositions. But I have before had occasion to observe<sup>z</sup>, that the plaintiff cannot obtain a decree on the testimony of one witness only, if the case stated in the bill be directly negatived by the defendant's answer.

The next thing is to set down the cause for hearing, unless the bill is brought only to perpetuate testimony. For<sup>a</sup> if, in that case,

<sup>x</sup> Pract. reg. ch. 314.      <sup>y</sup> 2 Atk. 48.

<sup>z</sup> Ant. 297.      <sup>a</sup> 2 Wms. 162, 3.

the cause be set down for hearing, the bill will be dismissed; yet, notwithstanding such dismissal, the depositions may be used at law. Other causes come on to be heard either in their turn, or on days specially appointed, when the *allegata et probata*, the pleadings and the evidence, are argued upon by the advocates, and judged of by the court, as the foundations of its decrees.—Decrees<sup>b</sup> in these courts, as we have formerly seen, are not made on mere discretionary principles, according to the arbitrament of the present judges, but are built on that scientific equity, which is authorised by precedents and the wisdom of successive experience, and which never ventures to contravene the fundamental maxims of the law. A<sup>c</sup> great characteristic of these jurisdictions is that they act upon the person, decreeing men to do, and permit to be done, what justice requires. Therefore<sup>d</sup> where a party is within, and amenable to, the jurisdiction of the chancery, and the cause of suit arises out of the jurisdiction, as in Scotland, Ireland, or the West India islands, that court may compel the party to do equity by its decrees. The court of chancery sends commissions for the examination of witnesses

<sup>b</sup> Vol. I. 202.<sup>c</sup> Vol. I. 207.<sup>d</sup> 1 Atk. 544. 3 Atk. 588. 1 Vern. 75 &c. 135.

into every region of the world. But it<sup>e</sup> cannot *directly* act upon real estate, lying out of its jurisdiction. Thus<sup>f</sup> it cannot award a commission to make *partition* of lands in Ireland. And tho it was formerly thought<sup>g</sup>, that the chancery might issue a sequestration<sup>h</sup> into Ireland, yet it<sup>i</sup> was made the foundation of that doctrine, that the courts of justice here have a superintendent jurisdiction over those in Ireland, which<sup>k</sup> foundation is now subverted. Accordingly<sup>l</sup> a sequestration to the plantations must issue by authority of the king in council, where alone an appeal lies from those territorial tribunals. But the chancery will (or at least<sup>m</sup> would before the late statute<sup>n</sup> for recognising the final jurisdiction in Ireland) appoint a *receiver* of estates in that kingdom; who was however to give security to account before a master of the court of chancery there.

<sup>e</sup> 1 Vez. 454.

<sup>f</sup> 2 Ch. ca. 214.    <sup>g</sup> 1 Vern. 75 &c. 135.    2 Wms. 261, 2.

<sup>h</sup> That is an authority or power to certain commissioners or sequestrators, to seise into their hands the defendant's real and personal estate, and to receive and sequester the rents and profits of his real estate, until he shall have answered the plaintiff's bill, or done some other matter ordered by the court. (1 Harr. ch. 308. ed. 1767.)

<sup>i</sup> 2 Wms. 262.

<sup>k</sup> Vol. I. 236.

<sup>l</sup> 2 Wms. 262.

<sup>m</sup> Ker v. Ker, in chancery, M. T. 12 G. III.

<sup>n</sup> 22 G. III. c. 53.

When,

When a decree is drawn up, and before it is inrolled, the court of chancery will, upon petition signed by two counsel, grant a *re-hearing*; which<sup>\*</sup> should be applied for within six months. But<sup>p</sup> the court will not consider itself as bound by a greater lapse of time not to grant a rehearing, where there is a clear discovery of any mistake, or of some important point not attended to at the original hearing. The<sup>r</sup> court has also ordered a rehearing, tho the parties had agreed to submit to such decree as the court should make in the cause, provided it should be on the merits, and not on any mistake in the pleadings; and that neither party should bring an appeal. But<sup>r</sup> the court will not set aside a decree made *by consent*.

Having thus far spoken of the ordinary course of proceedings in courts of equity to the time of a final decree, I shall, in the remaining lectures, treat of certain suits more peculiarly appropriated to those tribunals, beginning with *injunction causes*, as<sup>\*</sup> being certainly one of the most antient branches of equitable jurisdiction as established in this country.

<sup>\*</sup> Pract. reg. ch. 311. Bunb. 309. See Bunb. 142, 3.

<sup>p</sup> Vernon v. Wells, in chancery, E. T. 13 G. III. See *Errata*

<sup>r</sup> 3 Wms. 242, 3. <sup>r</sup> 2 Vez. 488. <sup>\*</sup> Ant. 32.

## LECTURE LVI.

*Of Injunction Causes.*

THE approaching conclusion of this course of lectures prevents me from discussing many of the occasions of instituting suits in equity. I propose therefore to confine myself to certain subjects of litigation, which are peculiarly adapted to these jurisdictions, treating first of the granting of *injunctions*, secondly of the *performance or rescinding of agreements*, and lastly of *testamentary causes*; — selecting these topics, by way of opening a *prospect*, rather than of taking a *survey*, of equitable jurisdiction.

*Injunction causes* are those, in which the bill <sup>a</sup> prays, besides the writ of subpena to compel the defendant to appear and answer, a writ also of *injunction*, inhibiting him from suing the complainant at common law, or laying him under some other special restraint. For <sup>b</sup> generally it is requisite, that he, who

<sup>a</sup> For it must be specially prayed, and is not grantable under the prayer of general relief. (Ambl. 70.)

<sup>b</sup> 2 Toth. 35. 1 Vern. 156.

seeks an injunction. should have a bill filed in court at the time. Yet<sup>c</sup> in cases specially circumstanced, this has been dispensed with.

It appears by the yearbooks, that in the reigns of Henry the sixth and Edward the fourth, the court of king's bench paid little attention to injunctions. And the<sup>d</sup> issuing of injunctions to stay proceedings at law, tho before judgment, is made an article of impeachment against cardinal Wolsey. But<sup>e</sup> there are precedents, before his time, of giving relief in chancery even after judgments at law. And the injunction practice is established as well by antient and constant usage, as by the result of that<sup>f</sup> memorable reference in James the first's reign, spoken of in my sixth lecture.

The two more usual kinds of injunction are for the purposes of *inbibiting the commission of waste*, or of *staying proceedings at law*; in which cases the<sup>g</sup> statute for the amendment of

<sup>c</sup> 2 Vern. 401. 1 Eq. ca. abr. 285.

<sup>d</sup> 4 Inst. 92. See Jur. Ch. vind. at the end of 1 Ch. rep. 40.

<sup>e</sup> Jur. ch. 38.

<sup>f</sup> Vol. I. 186.

<sup>g</sup> 4 A. c. 16. § 22.

the law allows the subpoena to issue before the bill is filed.

I. I shall first speak of injunctions for *staying waste*. By<sup>a</sup> the common law a prohibition went out of chancery against tenant by the curtesy, in dower, or as guardian, at the prayer of him, who had the inheritance, to inhibit waste, before it was begun to be committed. In conformity to this practice, but more general in extent, is the modern usage of inhibiting waste, on a bill filed for that purpose. It may therefore be inquired, who is intitled to such injunction.

This remedy then lies, not only where an action of waste might be brought, but in many cases where the party could not be sued at law. Thus, it seems<sup>i</sup>, a mere trustee *may* be restrained in equity from committing waste, tho he has a legal estate *of inheritance*. So also<sup>k</sup> may a tenant in tail after possibility of issue extinct, at least from committing extravagant and malicious waste. If there be

<sup>a</sup> 2 Inst. 299.

<sup>i</sup> 2 Toth. 37, 38. 2 Ch. ca. 32.

<sup>k</sup> 2 Freem. 53, 278. 1 Eq. ca. abr. 400. 2 Sho. 69.

an estate for life, remainder for life, remainder in fee, so that<sup>1</sup> no action of waste can be maintained, here also relief may be obtained in equity. The<sup>m</sup> reasonableness and necessity of interposing in this case is said to have been perceived so early as the reign of Richard the second; and that by advice of the judges an injunction was accordingly granted in chancery. A<sup>n</sup> bill to obtain an injunction against the commission of waste may likewise be filed on behalf of an infant in *ventre sa mere*. The court of chancery will interfere, in preventing unreasonable waste, on behalf even<sup>o</sup> of persons intitled only to *contingent and executory* estates of inheritance. Indeed where<sup>p</sup> trees have been cut down by a mere tenant for life, the property or value of them was adjudged to him, who, at the time of the felling, had the next immediate *vested* estate of inheritance, both in the king's bench and the chancery. But<sup>q</sup> where the tenant in possession agreed collusively with the remainder-man, intitled to the next vested estate of inheritance, to cut

<sup>1</sup> 1 Inst. 218. b. 13 ed. n. 2.

<sup>m</sup> Mo. 554. Ant. 32.

<sup>a</sup> 2 Vern. 711. 1 Vez. 555.

<sup>o</sup> 1 Eq. ca. abr. 400. 1 Vez. 555.

<sup>p</sup> 2 R. A. 119. 2 Wms. 240.

<sup>q</sup> 1 Vez. 524. 546.

down

down timber and divide the profits, the chancery decreed restitution for the benefit of a son born afterwards, and who took an intermediate estate in tail. However where the tenant in possession has an estate tail, tho there is a verbal restraint against his committing of waste, or tho being an infant in a very infirm state of health, and not likely to arrive at the age of majority, so as to cut off the in-tail and exclude the remainder-men by a recovery suffered, he should fell great quantities of timber, still the court would by no means grant an injunction. This I take to be invariable.

Another rule, but subject to exceptions, is that an injunction will not be granted, where the estate of the present tenant is created expressly "without impeachment of waste." For whatever might be the original design of introducing that clause, it seems now clearly understood as conveying a property in the timber. At common law then

<sup>r</sup> In *Mildmay v. Mildmay*, in chancery, 28th Jan. 1791, lord C. seemed to think the neglect of trustees to support contingent remainders, in omitting to prevent the felling of timber, was no breach of trust. See 1 Vez. 546 &c.

<sup>s</sup> C. T. T. 16.

<sup>t</sup> 1 Vern. 23.

<sup>u</sup> 1 Ch. ca. 242. 1 Wms. 528. 1 Vez. 265. 397. 2 Freem. 54. 1 Durnf. and East 56.

<sup>w</sup> 3 Atk. 216.

this clause gives to a tenant for life a power over the estate, like that of a tenant in fee: but equity has occasionally retrenched this authority. I proceed therefore to cases where injunctions have been granted notwithstanding that expression.

The case \* of Raby castle is a memorable instance in this respect; which was a litigation between a son plaintiff and his father defendant, the latter being tenant for life without impeachment of waste; and having taken some displeasure against his son, he suddenly employed two hundred workmen together, to strip the castle of lead, iron, boards, and other articles, to the amount of three thousand pounds. The plaintiff not only obtained an injunction to stay waste in pulling down the castle, but a decree, that it should be repaired, and put in its pristine condition. For<sup>v</sup> it was against the intention of all parties, and highly unreasonable, that the defendant should be at liberty to destroy the thing itself, of which he had made a settlement in consideration of his son's marriage. And \* so, for the most part, the chancery will restrain a tenant for life, whose estate is expressly created

\* 2 Vern. 738, 9.

<sup>v</sup> 1 Wms. 528.

<sup>v</sup> 2 Freem. 52. 2 Ch. ca. 32.

without impeachment of waste, from committing malicious, humorfome and extravagant waste: and it is frequently for the public good to moderate the exercise of this power. Therefore <sup>a</sup> a tenant for life without impeachment of waste, has been restrained by injunction from cutting down trees in lines or avenues, or ridings in a park, which were ornamental to the capital mansion, and also from cutting down trees not of a proper growth. If a <sup>b</sup> lessee also for years without impeachment of waste about the end of his term manifest an intention of prostrating or grubbing up a wood demised, a court of equity will issue an injunction, partly from a prospect to the public good. For <sup>c</sup> tho he might have

<sup>a</sup> 3 Atk. 217. 1 Vez. 265. Ambl. 107, 8. 2 Bro. 89.—  
But I shall here add another case, where a son was plaintiff, and his father defendant, the father being tenant for life without impeachment of waste, and the bill stating divers articles, as waste committed, of a trivial nature, but no injunction was applied for. Lord Hardwicke observed, that the clause, “without impeachment of waste,” was generally put in to prevent disputes of this kind: but if it were to be so made use of, that a son should have it in his power to call his father into a court of equity, for every alteration he makes in a walk or an avenue, tho he removes the trees to another part, and so of the house, it would be an endless fund of disputes between them; and it would be better for the public, that Raby castle had been pulled down, than that that precedent had been made. (1 Vez. 521, 2.) See 3 Bro. 549—565.

<sup>b</sup> 1 R. A. 380.

<sup>c</sup> 2 Freem. 55.

D d 2

felled

felled trees every year from the beginning of his term, (and then they would have been growing up again gradually) yet it is unreasonable that he should sweep them all away towards the end of his term. In like manner<sup>d</sup> a bishop's lessee without impeachment of waste has been restrained from digging brick earth in such quantities as tended to destroy the field, and ruin therein the inheritance of the church. Where<sup>e</sup> also a jointress committed the same excess, felling timber without employing it in repairs, and in such unreasonable quantities, that there was none left on the premises, fit even for reedifying farm houses, she was restrained from cutting any more trees off the estate without leave of the court. It may also be remarked, that<sup>f</sup> the chancery, on application by a landlord, at a ground rent, and who was himself but a termor for years, staid the commission of waste by his under lessee. In which case it was laid down by the court, that where a mortgagee in fee in posses-

<sup>d</sup> 1 Wms. 527.<sup>e</sup> 1 Vez. 264.<sup>f</sup> 3 Atk. 723. Ambl. 105.—It appears by the register's book 12th Feb. 1750, A. 184. b. that the plaintiff's term, which was originally a long one, was to expire in about four years, and that the defendant began committing waste soon after the under demise to him.

tion commits waste by cutting down timber, and the money arising by sale of the timber is not applied in sinking the principal and interest of the mortgage money, the court, on a bill brought by the mortgagor to stay waste, and a certificate thereof, will grant an injunction. So likewise if there be a mortgage *for years only*, and the *mortgagor* commit waste, the court, on a bill by the mortgagee to stay waste, will grant an injunction: for they will not suffer a mortgagor to prejudice the incumbrance, or so considerably to diminish the value of the pledge. An <sup>e</sup> injunction may be granted, at the instance of the patron, against a rector's committing waste on the glebe; and during a <sup>h</sup> vacancy, against the like attempt by a widow of the late incumbent; and <sup>i</sup> even against a bishop, on behalf of the king, the patron of bishopricks.

The case of mines, in this respect, seems to be on a peculiar footing. Where <sup>k</sup> A. was tenant for life, not without impeachment of waste, but the conveyance expressly passed all mines, waters, trees, and other emoluments,

<sup>e</sup> Ambl. 176.<sup>h</sup> 2 Bro. 552, 3.<sup>i</sup> Ambl. 176.<sup>k</sup> 2 Wms. 242.

still it was holden he could no more *open* a mine, than he could cut down timber, tho both appeared to be equally granted by the deed. For the meaning of inserting mines, trees, and water, was, that all should pass; but as the timber and mines were part of the inheritance, no one should have power over them, but such as had an estate of inheritance limited to him. On the other hand, where <sup>l</sup> a coal mine *has been opened* by the lawful authority of a tenant in tail, the court has afterwards allowed it to be worked by a tenant for life, and refused to restrain him by injunction; tho he had removed the earth in several places, and made new apertures to admit the air, for the ease and relief of the miners, in pursuing the same vein. If <sup>m</sup> however an estate for life or years have the clause annexed, “without impeachment of waste,” that seems a complete authority to open any new mines.

II. The other kind of ordinary injunctions, granted in courts of equity, are for *staying proceedings at law*. Such <sup>n</sup> injunction sometimes stays trial, or after verdict, judgment, or after

<sup>l</sup> 2 Wms. 388, 9.  
marg.

<sup>m</sup> 1 Sal. 161. 1 Eq. ca. abr. 399.

<sup>n</sup> Pr. Reg. Ch. 201, 2.

judgment,

judgment, execution; or if the execution hath been effected, it may stay the money in the hands of the sheriff; or if part only of a judgment debt has been levied by a *fieri facias*, it may restrain the suing out of a *capias ad satisfaciendum*, being the process for casting insolvents into prison.

It is impossible to recount on how many occasions justice may require a stop to be put to actions.

First, courts of equity will protect the officers, who execute their process. Thus°, an action for false imprisonment was brought, founded on an arrest made by virtue of process, which issued irregularly out of the court of chancery. But an injunction was granted, because that court only ought to examine, judge of, and punish the irregularity. So<sup>p</sup> where a man went over the defendant's ground into his house to serve him with a subpoena, for which trespass an action, *quare domum et clausum fregit*, was commenced, such action was stayed by injunction.

° 1 Vern. 269.

<sup>p</sup> Pr. Reg. Ch. 217.

There are besides numberless causes, which may render it against conscience to prosecute an action at law. Thus<sup>a</sup> where a large sum of money was won at play, and forcibly resumed by the loser, before the other left his house, for which an action was brought, and the bill in chancery alleged fraud and unfair advantages on the part of the winner, the court stayed the action at law by injunction till the hearing of the suit in equity.

Thus also<sup>r</sup> where an estate was settled on a jointress without impeachment of waste except in pulling down houses and felling timber, remainder to her son for life without impeachment of waste generally, remainders over, the son by leave of the jointress felled a quantity of timber, and died; after whose death, a daughter, intitled to the next remainder in tail, sued her mother at law, to recover treble damages, and the place wasted: there being evidence of an express consent, or a general tacit consent, or encouragement, to the felling of the timber, given by such daughter, plaintiff at law, she was restrained pro-

<sup>a</sup> 1 Vern. 489, 490.

<sup>r</sup> 1 Vez. 396.

ceeding in her action of waste, by the court of chancery's injunction.

If a <sup>\*</sup> mortgagor bring a bill to redeem, it is at law accounted a breach of the covenant for quiet enjoyment. But if an action of covenant be in such case brought, the chancery will grant an injunction.

If a <sup>†</sup> lord of a manor bring ejectments against his customary tenants on pretence of forfeiture, some of whom file a bill, praying he may shew, what breaches of the custom he designs to insist on at the trial, upon the general issue in ejectment, and he is in contempt for not putting in an answer, or the like, the court will order an injunction.

These are instances of extensive application.

The court will<sup>u</sup> grant injunctions in mixed, as well as personal, actions, as in waste, (of which an example has been just given) in ejectment, and in *quare impedit* ; or to stay the

<sup>\*</sup> Pr. Reg. Ch. 211.

<sup>†</sup> Pr. Reg. Ch. 216.

<sup>u</sup> 1 Toth, 114, 5.

reversal of a fine, which is of the nature of real actions. And \* by injunction proceedings may be stayed in another court of equity, or in the admiralty or ecclesiastical courts, as well as those of common law.

It is a very common ground for obtaining an injunction against an action at law, commenced on a written instrument, as a bond, promissory note, policy of insurance, or the like, to allege, that such instruments were procured unfairly and by misrepresentation. Thus, for instance, a party, sued on a policy of insurance on a life, may file a bill against the plaintiff at law, calling upon him to set forth, whether his agent or broker did not represent the person, whose life was insured, in a state of health very different from the truth; which fraud may be a ground for an injunction to stay the action. Many such suits indeed have of late years been brought merely for delay, and chiefly in the exchequer, because † an injunction of that court stays all farther

\* Pr. Reg. Ch. 196. 1 Toth. 114. 1 Ch. ca. 80. 1 Atk. 628. See 3 Atk. 350, 1.

† But tho an injunction in the exchequer regularly suspends all the proceedings at law, yet that court will upon motion permit

farther proceedings at law, in whatever stage the cause may be. Whereas in chancery, if a declaration be delivered, the party may proceed to judgment, notwithstanding an injunction, and execution only is stayed: but if no declaration have been delivered, all proceedings at law are restrained: that<sup>z</sup> is the practice, and the construction constantly put upon the words in the latter end of the writ itself.

Sometimes there may be an injunction against suing on a written instrument, without the supposition of any fraud. As<sup>a</sup> if bond creditors of the ancestor have obtained a decree for sale of lands against the heir, an injunction will be awarded against other bond creditors, to restrain their proceeding at law, if they have not obtained judgment.

mit the plaintiff in the action to give notice of trial, on his undertaking not to sue out execution. For tho it may be argued, that such notice of trial cannot have its proper effect, because the party, served with it, cannot prepare for his defence without the discovery sought by his bill, yet, in effect, he receives no injury by the practice. For if the answer be full, he has gained the desired discovery: if it be exceptionable for insufficiency, or if the injunction be continued on the merits, the notice of trial is a nullity. (Legg against Da Costa, in the exchequer, H. T. 13 G. III.)

<sup>z</sup> 2 Kel. 17. See 3 Wms. 146 &c. and n.

<sup>a</sup> 1 Ve2. 211.

Sometimes

Sometimes also there may be a conditional or qualified injunction. Thus<sup>b</sup> upon a motion in chancery to stay proceedings on a bond, upon offer to give judgment with a release of errors, the lord keeper answered, that he did not think that, so beneficial a proposal as it might be looked upon; for that, notwithstanding such release, the plaintiff might bring his writ of error, and put the defendant to plead his release, and so delay time as long as if no release of errors had been given. But upon the plaintiff's offering to be bound to bring no writ of error, an injunction was awarded. This is cited as tending to unfold the course of practice. But<sup>c</sup> the most common condition annexed to injunctions, is that of securing the fund by bringing it into court.—Where<sup>d</sup> the application was to restrain the defendant either from bringing an action on a promissory note, suggested to have been given for undertaking to bring about a marriage, (which is called a *marriage brocage* transaction) or to prevent him from assigning over such note, the plaintiff's case being supported by an affidavit, the court made an order on the

<sup>b</sup> 1 Vern. 120.<sup>c</sup> 2 Bro. 182 &c. and n.<sup>d</sup> 3 Atk. 566. Ambl. 66, 67.

defendant

defendant to keep the note in his own possession, and not to assign or indorse it over, but would not extend the injunction so far as to inhibit the payee himself from proceeding at law. This is an instance of qualifying or abridging the extent of the injunction prayed.

Another<sup>c</sup> ground for interfering in the mode we are treating of is this, that where there is a trust, or any thing in the nature of a trust, notwithstanding the ecclesiastical court has an original jurisdiction in legacies, yet chancery will grant an injunction, trusts being so peculiarly subject to the cognizance of that tribunal.

Originally and strictly the court of chancery has no restraining power over criminal prosecutions. The proper course is to apply to the attorney-general for a *nolle prosequi*, where the matter in dispute, and made the subject of an indictment, is a mere civil right, and may be redressed by an action of trespass. But where<sup>f</sup> the plaintiffs claimed a sole, and the defendant a concurrent, right of fishery, and a bill and cross bill were brought to establish

<sup>c</sup> 1 Atk. 491.

<sup>f</sup> 2 Atk. 302, 3.

such several claims, which was a submission of their respective rights to the court, notwithstanding all which, the plaintiffs caused the agents of the defendant to be indicted for a breach of the peace, in fishing in their liberty, these matters being disclosed, the court of chancery, tho it could not, strictly speaking, grant an injunction to the prosecution itself, yet inhibited those prosecutors from proceeding on the indictment till the hearing of the equity suit and farther order.—It may here be mentioned, that<sup>e</sup> the chancery will not by injunction stay the proceedings on a *mandamus*; for it would be opening a new jurisdiction to the court, as in corporation and borough causes, which would occasion great inconvenience and mischief.

Besides restraining the commission of waste, and staying proceedings apprehended or commenced in other courts, there are numerous occasions of seeking relief by the equitable writ of injunction.

Thus it hath issued to prevent<sup>h</sup> payment of

<sup>e</sup> 2 Vez. 398.

I

<sup>h</sup> 1 Ch. ca. 75.

money

money to a pretended executor, till his right to the executorship was determined, and to stop<sup>i</sup> other undue disbursements and<sup>k</sup> injurious designs.

Injunction bills are often filed to stay the printing and vending of books, of which the complainant claims the copy right under the statute, which creates and protects literary property. It is said<sup>m</sup> to have been the opinion of lord Hardwicke, that the receiver of letters has no legal right (I speak not of the delicacy or propriety of such a measure) to publish them; because at most he has but a special property in them, jointly with the writer. The<sup>n</sup> same doctrine has been since confirmed and established. But the reason attributed to lord Hardwicke, that a special property is left in the writer, seems at least so equivocally expressed, as to need explanation: for surely every receiver of letters may destroy them. It is however a different thing to publish them to the world, without the writer's consent; from which mischievous consequences might ensue.

<sup>i</sup> Bunb. 289.

<sup>k</sup> 2 Bro. 64, 65. See Ambl. 158 &c.

<sup>m</sup> 8 A. c. 19. See vol. II. 394.

<sup>n</sup> 2 Atk. 342.

<sup>o</sup> Ambl. 737 &c.

If

If an injunction be sought for the purpose of restraining<sup>o</sup> matters of general utility, as the carrying on of a certain trade, the ploughing of particular lands, the working of a colliery, or the navigating of a ship, the court will require stricter proof of the complainant's right to such relief<sup>p</sup>.

Injunctions are either *temporary*, as until the coming in of the defendant's answer, or until the hearing of the cause in equity, or otherwise of *perpetual* continuance.

Of this latter sort are, chiefly, injunctions to quiet the possession of estates, after several trials at law, on what have been called *bills of peace*. But the court has formerly been averse from granting perpetual injunctions.

\* See 2 Ch. ca. 165. 1 Vern. 127. 2 Vez. 112. Amb. 209.

<sup>p</sup> An application was made, some years ago, to the court of chancery for an injunction to inhibit the defendants from dissolving a commercial partnership; the other side proposed to defer it, as not having had time to answer the affidavits; but it was insisted, that this was in the nature of an injunction to stay waste, and that irreparable damage might ensue. At length the court deferred it, the defendants undertaking not to do any thing prejudicial in the mean time. But no doubt arose concerning the general propriety of such an application. (Chancery against Van Sommer in chancery, M. T. 11 G. III.)

For

*Can the power be constitutional?  
a contract with an express  
right.*

For<sup>a</sup> altho there had been five verdicts in ejectment in favor of the complainant in equity, the then lord keeper refused perpetually to injoin the defendant from bringing any more actions at law to try the title. But in later times perpetual injunctions for quieting possession have been granted with less reserve. For in a subsequent<sup>r</sup> case, it was declared by the court, that if an estate be devised in trust to be sold, and on a bill brought against the trustees for a sale, the heir contest the will, after two trials the chancery will grant a perpetual injunction. In real actions the verdict is conclusive. But at common law ejectments may be brought without end, on a pretence that they are founded on a new demise, which has never been litigated. And therefore the<sup>r</sup> practice of these perpetual injunctions was very reasonably introduced, that the right might be quieted in ejectment. It is said, also, 'that where a bill in equity is taken *pro confesso*, by reason of the defendant's contempt in disobeying all process, if the suit be to quiet a

<sup>a</sup> Gilb. eq. rep. 2.

<sup>r</sup> 1 Wms. 672 &c. 2 Bro. parl. ca. 217 &c. In that case there had been two verdicts against the party moving for the perpetual injunction, and then two verdicts in favor of him in trials at bar, one in the exchequer, the other in the king's bench:

<sup>s</sup> Str. 404. Bunb. 158, 9.

<sup>t</sup> Pr. reg. ch. 197.

possession, or to stay proceedings at law, the court will decree a perpetual injunction. Likewise" where an issue was directed out of chancery, to try the validity of a will of personalty, and the verdict was against it, the court granted a perpetual injunction against proving it before the ecclesiastical judge. The \* proof of a will may also be as properly concluded by the admission of a party concerned in interest, as by a trial, and this may be a ground for perpetually injoining him from contesting it in the ecclesiastical court.

A temporary injunction will be made perpetual, where the same reasons continue, which prevailed at the original awarding of it, and the complainant verifies the just grounds and allegations of his bill. An injunction already granted may be continued, as on filing exceptions; and a dissolved injunction may be revived, if there is ground for it. It is laid down in a book<sup>y</sup> of credit, that amending a bill never moves or touches an injunction. But the practice I apprehend to be, that if it be an injunction obtained on praying time to answer, or the like, it is regularly dissolved by an order to amend; (still it seems proper

\* 1 Ch. ca. 80. See 2 Atk. 379.

\* 1 Atk. 629.

<sup>y</sup> Pr. reg. ch. 210. See 3 Bro. 427, 8.

to have it dissolved by order of court, before any proceeding had at law) otherwise, if the injunction issued on argument of the merits of the case, it regularly continues to the hearing.

The obtaining or dissolving of injunctions is transacted by motion, except when a perpetual injunction constitutes part of a decree. Upon<sup>2</sup> a plea or demurrer's being allowed, the injunction, that was granted till answer, will commonly be dissolved, but not always. Neither is the dissolving of it absolute on the first motion, but only *unless cause is shewn to the contrary*.

Lastly, injunctions<sup>3</sup> ought to be obeyed, notwithstanding there may have been some irregularity in their issuing; which may be a subsequent matter of dispute and discussion.

In the doctrine of injunctions, I have been necessitated to leave some points, of the practical kind, untouched; sufficient has been said to make it appear, that these writs may on many occasions essentially promote the ends of justice, and may be thought a meritorious improvement in rational jurisprudence.

<sup>2</sup> Pr. reg. ch. 200. 211, 2.

<sup>3</sup> 2 Ch. ca. 203, 4.

## LECTURE LVII.

*Of the performance or rescinding of agreements as decreed in courts of equity, in construction of the statute 29 C. II. c. 3.*

THE specific execution or rescinding of agreements is one of the most common and natural occasions for the exercise of equitable jurisdiction. On this topic, I shall first consider such agreements as may be affected by the<sup>a</sup> statute of frauds and perjuries, and shall afterwards treat of such as by reason of fraud (independently of that statute) or of other circumstances, ought to be cancelled, or declared void, or left to the remedies at law, or (otherwise) where a specific performance is decreed.

The too frequent practice of fraudulently setting up pretended agreements, and nuncupative wills, and then supporting them by perjury, induced the legislature to pass the act, which we are to consider: and it is a regulation very just, and of public utility, that

<sup>a</sup> 29 C. II. c. 3.

in matters of importance a written instrument should generally intervene. By this statute it is<sup>b</sup> enacted, "that all interests in lands, tenements, or hereditaments, *except leases for three years*, not put in writing and signed by the parties, or their agents authorised by writing, shall not have, nor be deemed in law or equity to have, any greater force or effect than leases or estates at will." It is farther<sup>c</sup> enacted, "that no action shall be brought, whereby to charge any person upon any agreement made upon any consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement, that is not to be performed within the space of one year from the making thereof, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party or his lawful agent." By the same<sup>d</sup> statute, declarations of trusts created by the parties are to be in writing. But<sup>e</sup> trusts resulting by implication of law are to remain as they stood before the passing of the act.

<sup>b</sup> § 1.<sup>c</sup> § 4.<sup>d</sup> § 7.<sup>e</sup> § 8.

The consideration, which I shall at present give to this law, will be, chiefly, by shewing, to what instances the clauses recited have been construed not to extend.

I. The first case which I shall mention as reasonably excepted out of the operation of the law, is<sup>f</sup> where a bill is brought for the specific performance of an agreement, the substance whereof is set forth in the bill, *and confessed by the defendant's answer*; here the court will decree execution of it; for in this case there is no danger of fraud or perjury, which are the only things the statute intended to prevent. But<sup>g</sup> where the defendant in his plea or answer insists on the benefit of the statute, and does not confess the agreement, a specific execution of it cannot be obtained, unless it is supported and made out by letters or writing, and the particular terms therein stipulated, as a foundation for the decree.

<sup>f</sup> Eq. ca. abr. 19. Prec. ch. 208. See 9 Mod. 86 &c. 6 Bro. parl. ca. 45 &c. 1 Bro. 404 &c. 2 Bro. 55 &c.

<sup>g</sup> Prec. ch. 374.—In pleading the statute, it is not sufficient to say, that no contract, not reduced into writing, can be good, or the like, but the defendant must positively aver, that the agreement in question was not reduced into writing. For in this respect at least *argumentative* pleading, as it is called, is as much discountenanced in courts of equity as of common law. (Prec. ch. 533: but see 1 Vern. 114.)

There

There are indeed <sup>h</sup> several cases, where a father's promise, by letter, to give a certain marriage portion to his daughter, and his approbation of the intended nuptials, have been holden to satisfy the statute, and the portion has been decreed. But <sup>i</sup> if a father, in consideration of marriage, promise to give his daughter a portion, without reducing it to any certainty, this seems no foundation for a decree. And <sup>k</sup> so in other cases, a letter is not a sufficient evidence of an agreement, in order to avoid the statute, without an express specification of the terms, or <sup>l</sup> without referring so clearly to a supposed agreement, as to shew what was meant. But <sup>m</sup> where a woman gives her intended husband a bond, conditioned to settle her lands on him in fee, the bond, tho void in law by reason of the intermarriage, is good evidence of the agreement so specified in the condition, on a bill in equity to carry it into execution. And the written evidence of agreements must be solely adhered to, where no fraud appears. To <sup>n</sup> add to an agreement

<sup>h</sup> Eq. ca. abr. 22. 2 Freem. 201.

<sup>i</sup> Gilb. lex præ. 243.

<sup>k</sup> 1 Atk. 13.

<sup>l</sup> 3 Bro. 161, 2. 318 &c.

<sup>m</sup> 2 Wms. 242 &c.

<sup>n</sup> 2 Atk. 384.

in writing by parol evidence, which would affect land, is not only contrary to the statute of frauds, but to the rule of common law before that statute. Therefore where<sup>o</sup> a husband had given a bond to trustees to secure five hundred pounds to his wife, if she survived him, the court rejected parol evidence to prove that it was intended in lieu of her dower.

II. A second and similar ground, for excepting cases out of the operation of the statute, is where a parol agreement has been partly carried into execution. For this is evidence that there was such a contract; and if one<sup>p</sup> part of an agreement be performed by one side, it is but common justice to carry it into execution on the other. But what shall be an available part performance, has been much controverted. It seems<sup>q</sup> to have been thought, soon after the passing of the statute, that if a tenant, in confidence of the promise of a lease, expended money in repairs and improvements, this was not a sufficient ground to decree such lease. But in a<sup>r</sup> subsequent case

<sup>o</sup> 3 Atk. 8.

<sup>p</sup> 2 Atk. 100.

<sup>q</sup> 1 Vern. 151. 159.

<sup>r</sup> Prec. ch. 561. Str. 783.

the contrary opinion is advanced by the court. Indeed \* where a bill was brought for a specific performance of an agreement for a lease, suggesting (among other reasons) that it was in part performed, and praying an injunction against the landlord's action of ejectment, the lord chancellor refused to continue the injunction till the hearing, (altho the defendant had in his answer sworn, he believed, he did in some measure consent to the granting of such lease as prayed) because the part of the agreement, which was executed, was not particularly beneficial to the defendant, being conditions proposed by the complainant, who had no subsisting term in the lands, but was tenant only from year to year. On the other hand, it \* hath been holden by lord Hardwicke, that when a man *de novo* takes possession, or does any act of the like nature, in pursuance of an agreement, the court will decree an execution of it on the ground of its being in part performed; altho he did not

\* Williams v. Hufsey, in chancery M. T. 13 G. III.—The defendant in his answer also said, "he believed and hoped to prove, the plaintiff had greatly impoverished the premises."—I argued for the plaintiff, 1. on the part execution, 2. on the admission of the agreement in the answer, 3. on the offer to go on to proof.

1 1 Atk. 13. 2 Freem. 269.

think

think it sufficient for this purpose, that the party seeking the execution of the agreement, had " given directions for conveyances, or gone to take a view of the estate. So where a parol agreement was for a building lease, and before it was reduced into writing the lessee began to build, and afterwards, on a difference about the terms of the lease, the lessee brought a bill, the lessor insisted on the statute, and the lord keeper dismissed the bill, the plaintiff, on an appeal, had relief in the house of lords. This case was cited by the court as an authority for giving relief, where \* a written agreement of lease had specified the sum to be allowed for repairs, and that being found insufficient, the tenant offered to lay out more money, if the landlord would enlarge his term, which being consented to, the lessee went on with the improvements, and had a decree for the performance of the new agreement, thus executed in part.

Altho' the statute is a protection against the defendant's making a discovery of a parol agreement, and therefore may be *pleaded* as well to the discovery as the relief, yet that

\* 3 Bro. 400, 1.    \* 5 Vin. abr. 522, 3.    † Ant. 384, 5.  
rule

rule extends not to facts subsequent, shewing a part performance. For a<sup>2</sup> parol agreement executed in part is binding on the parties, and will be carried into farther execution in equity.

Lastly, <sup>a</sup> if the purchase money be paid or secured, or a considerable part of it deposited, that seems, generally, such a part performance as will induce a court of equity to carry the rest of the agreement into execution.

III. As to the clause of the statute, which speaks of signing, it has been <sup>b</sup> holden, that subscribing a deed, as a witness, and not as a party, provided the contents are known, or a<sup>c</sup> signature of the name, in the body of the instrument, and intended to give authenticity thereto, is sufficient within the meaning of the act. An <sup>d</sup> agreement also signed by one party may sometimes be conclusive against both. We must also observe, that<sup>e</sup> tho the contract itself must by the statute be in

<sup>2</sup> 1 Vez. 221. 298. 441.

<sup>a</sup> 2 Vern. 619. 1 Vez. 83. vid. 1 Vern. 472, 3. Pree. ch. 560. Ch. rep. 241, 2.

<sup>b</sup> 1 Vez. 7, 8. 2 Ch. ca. 164.

<sup>c</sup> 1 Wms. 770 &c. 771. n. 1. (4 ed.)

<sup>d</sup> 1 Vez. 82.

<sup>e</sup> 5 Vin. abr. 524. and t. contract and agreement H. pl. 45.

—Wedderburne v. Carr, in the exchequer, T. T. 1775.

writing,

writing, *an authority* to buy or treat as agent for another may be good and effectual without any writing.

IV. The discharge or dissolution of an agreement is as much a contract as the original contract itself. Yet there are authorities, which seem to prove, that a written contract may, notwithstanding the statute, be subsequently controled by a parol agreement. But if the contract respect land, such cases must perhaps be considered as exceptions, under special circumstances, from the general rule to the contrary. The single point of one <sup>f</sup> case was, whether an agreement in writing made since the statute might be *discharged* by parol; and it was holden in the affirmative, and the bill was dismissed, that was brought to have it performed in specie. This however is widely different from controlling and new modeling written contracts by parol, and from admitting parol evidence to explain a written agreement, in present and actual force. It has been holden <sup>g</sup> in a court of common law, that where a policy of insurance was made, and there was a parol agreement at the same

<sup>f</sup> 1 Vern. 240. 2 Vez. 299. 376.

<sup>g</sup> 2 Sal. 444 5.  
time,

time, that the insurance should not commence till the ship arrived at a place specified, that the parol agreement should avoid and control the writing. But these are contracts not affecting lands. In <sup>h</sup> equity also, a parol agreement has been allowed even to vary a deed of trust, executed in order to avoid a seizure by the sequestrators, under the predominant party in the time of the great usurpation. But <sup>i</sup> this, which was successively decreed by three great judges in equity, is considered clearly as an exception from the common rule, and referred to the extraordinary circumstances of the case. Lastly, <sup>k</sup> where a feoffment was made, and the feoffee promised by parol to make a defeasance, yet the promise was decreed valid, notwithstanding the statute. This however seems to have been the case only of a mortgage, and to rest on the known nature of those transactions. For <sup>l</sup> if an absolute conveyance be made for a certain sum of money, and the person to whom it is made, instead of entering and receiving the

<sup>h</sup> 2 Ch. ca. 180 &c.

<sup>i</sup> Fitzgib. 213, 4.

<sup>k</sup> Skin. 143. Prec. ch. 526. 2 Freem. 269. 281. 285.  
9 Mod. 88.

<sup>l</sup> Prec. ch. 526. See 1 Vern. 108, 9. 2 Freem. 280, 1.

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profits,

profits, demand interest for his money, and have it paid him, this will be admitted to explain the nature of the conveyance, and to prove that it was but a mortgage.

V. As to the expression, in the statute, of agreements not to be performed within one year, the following rule of construction has obtained. A <sup>m</sup>parol promise was made to pay money upon the return of a ship, which happened not to return within two years, and whether this parol promise was void by the statute was made a question before all the judges; and they were of opinion, that this was a valid undertaking; for the ship might have returned within a year, and the clause of the act extends only to such promises, where, by the express appointment of the party, the thing is not to be performed within that space of time. So <sup>n</sup> if the promise depend on any other contingency, which may not take place for a long time, yet if it do or may happen within a year, an action is maintainable. Thus <sup>o</sup> a contract to pay one hundred pounds on the day of a future marriage is not vitiated

<sup>m</sup> 1 Sal. 280.

<sup>n</sup> Skin. 326.

<sup>o</sup> Comb. 463.

by the statute, for it includes only such agreements as by the terms of them are impossible to be performed within a year. I cite these determinations at law, whilst I am treating of suits in equity, because (altho courts of equity only can decree a specific execution of agreements) the<sup>p</sup> same rules of construing this statute are to be adhered to in each jurisdiction. Accordingly the same doctrine, that the statute did not extend to promises depending on contingencies, which possibly might not take place within a year, was<sup>q</sup> recognized by an equitable jurisdiction, the court of exchequer, on a bill filed for a specific performance of an engagement to procure a certain office for the defendant in the suit.

VI. Another ruling principle, in the construction of the statute before us, is that it never shall be set up as a protection to fraud, which is the thing it was intended to prevent. If therefore the reducing of an agreement into writing be prevented by fraud, no party shall avail himself of the statute, by making that an objection, of which he was the fraudu-

<sup>p</sup> 1 Atk. 15.

<sup>q</sup> 5 Vin. abr. 524, 5.

lent author. Thus where instructions were given by an intended husband for the preparation of a marriage settlement, which were afterwards by him countermanded, but the marriage was had, the wife filed her bill to have the settlement executed, to which the husband *pleaded* the statute, the court admitted, that, in cases of fraud, equity would relieve even against the words of that law. As if one agreement should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former, in this or such like cases of fraud, equity would relieve. But where there is no machinated fraud, and only a relying upon the honor, word or promise of the defendant, the statute making these promises void, equity will not interfere. Nor were the instructions given to counsel for preparing the writings material; since after they were drawn and engrossed, the parties might refuse to execute them. And as to a letter of the defendant, which was insisted upon, it consisted only of general expressions, as that the estate should be at the plaintiff's command, or at her ser-

2 1 Wms. 620. 1 Eq. ca. abr. 19, Prec. ch. 526.

vice.

vice. Indeed had it recited or mentioned the former agreement, and promised the performance thereof, it would have had effect. And so, as this case was circumstanced, the court allowed the plea. In which case however a distinction was taken, and agreed by the court, that where on any treaty the parties come to an agreement, but the same is never reduced into writing, nor any proposal made for that purpose, so that they rely wholly on their parol agreement, that unless this be executed in part, neither party can compel the other to a specific performance, for that the statute is directly in their way: but if there were any agreement for reducing the contract into writing, and that is prevented by the fraud and practice of the other party, that the court of chancery will on such occasions give relief.

In another case<sup>\*</sup> it was holden, that where there is a parol agreement made for a lease, and the lessee, by virtue of such agreement, enters and builds, the court of chancery will establish it on the foot of *fraud* in the lessor, notwithstanding the statute; because contracts

<sup>\*</sup> 2 Bro. 565.<sup>\*</sup> 9 Mod. 37.

executed in part are not always within that statute, tho<sup>u</sup> executory contracts are. The apparent fraud likewise influenced the construction put upon the statute in respect to the following transaction. The<sup>x</sup> plaintiff had by parol agreed with the defendant for a piece of ground contiguous to a leasehold house, for the unexpired residue of the term, which the plaintiff had in his said house, and when in confidence of such agreement he had erected a wall and made a vault for the conveniency of such mansion, the defendant refused to execute a lease. A bill was filed to enforce performance of this contract, and the statute was pleaded to it. But the plea was overruled, and the defendant was decreed to perform the agreement, and to pay costs. For the<sup>y</sup> statute,

<sup>v</sup> Executory contracts are within, or not within, the statute of frauds, according as we refer to distinct clauses of that law, and *secundum subjectam materiam*, respectively. The common subject matter of contracts, sought to be performed in court of equity, is real estate. Such contract, if executory merely, and not in part executed, is within the coercion of the statute. But as to the clause, that contracts for goods shall not be valid, unless part of them are delivered, or something paid, or there is a note in writing, if goods be bespoke, no part can be immediately delivered. Here then courts of law have said; that such executory contract is not within the statute: (ant. 150.) and as to such contracts, the statute is not pleadable to a suit in equity. (3 Bro. 154 &c.)

<sup>x</sup> 2 Freem. 268, 9.

<sup>y</sup> Ambl. 68.

it was said, was not made to encourage frauds and cheats; and the <sup>z</sup> plaintiff having laid out his money in pursuance of the agreement, and taken possession of the land, the defendant ought to execute a lease for as long time as the plaintiff had in his house. In these determinations concurrent reasons might corroborate and confirm the judgment given: as the delivery of possession, amounting to a part execution, might have its weight, as well as the imputation of fraud in the defendant; but the latter seems to have been the leading consideration. In a case, circumstanced like the foregoing, the court went perhaps something farther. The <sup>a</sup> bill was to have a lease according to the defendant's promise, the plaintiff having expended money on the premises, and the defendant insisted on the statute, there being no contract in writing, *nor* <sup>b</sup> *any certain terms agreed upon*, and alleged; that what the plaintiff laid out was not on lasting improve-

<sup>z</sup> The acts, insisted on as a part performance, ought to be such as would be a prejudice to the party doing them, if the agreement were to be void; and they ought also to appear to be done with a view to the agreement. (Ambl. 586, 7.)

<sup>a</sup> 5 Vin. abr. 523.

<sup>b</sup> But where the court has not taken it up on the ground of fraud, it has said, the terms of the agreement must be certainly proved. (Ambl. 586.)

ments, but admitted, he had indeed built a stable, which cost him about ten pounds. It was proved, that the defendant told the plaintiff, "his word was as good as his bond," and promised the plaintiff a lease, when he should have renewed his own from his landlord. The lord chancellor said, that the defendant was guilty of a fraud, and ought to be punished for it; and so decreed a lease to the plaintiff, *tho the terms were uncertain*, and referred it to the plaintiff's election, for what time he would hold the premises in question; who accordingly elected to hold them, during the defendant's term, at the old rent.

Under this head of fraud, it is farther to be noted, that <sup>c</sup> if a man, in confidence of a parol promise, omit making that certain provision for others, which he intended, such promise has in divers instances been enforced in equity. As where a tenant in tail was about to suffer a recovery in order to provide for his younger children, and had been kept from it by the issue in tail promising to do it, it was accordingly decreed in chancery. So where a father being about to make his will, and thereby

<sup>c</sup> Ambl. 67, 68.

to constitute certain provisions for his younger children, and his son and heir apparent persuaded him not to make any such will, declaring that he would take care his brothers and sisters should be provided for in the manner intended, whereupon the father desisted, the chancery decreed, that the same provisions, as were in contemplation, should be effectuated against the heir. These authorities were cited in a<sup>d</sup> case, where a copyholder, intending that the greatest part of his copyhold estate should be enjoyed by his godson, and the rest by his wife, was by her prevailed upon to nominate her his successor according to the custom of the manor, on the assurance, that she would permit the godson to have such part of the land as was intended for him; but she afterwards refusing to fulfil this engagement, a bill was brought to enforce it, and the statute was insisted on by way of plea. All the commissioners of the great seal were of opinion for the plaintiff, and said, they decreed it, not as an agreement, or as a trust, but as a fraud. Indeed their opinion is added, that seeing, by the custom of that manor, an estate might be created by parol without writing, a

<sup>d</sup> 5 Vin. abr. 521.

trust of such parol estate might likewise be raised without writing, notwithstanding the statute. I shall subjoin another case, in which every one must have lamented, if the fraud had been ultimately attended with success. A<sup>c</sup> father purchased lands to him and his heirs, and when he was on his death-bed sent for his eldest son, and told him, that these lands were bought with his second son's money, and that he intended to give them to him, whereupon the eldest son promised, that he should enjoy them accordingly. The father dies. The lord keeper Wright and the master of the rolls held, that the eldest son ought to have these lands, because by the statute there ought to have been a declaration of the use or trust in writing. But lord chancellor Cowper, that great master of equity, as his successor styled<sup>f</sup> him, was of another opinion, because of the fraud here manifest, in that the eldest son promised the father upon his death-bed, that the other should enjoy the lands, so he took this to be a case out of the statute.

VII. Both the last determinations lead me to remark, in respect to the clauses of the statute

<sup>a</sup> 5 Vin. abr. 521. See farther Gilb. eq. rep. 4. 11.

<sup>f</sup> 1 Wms. 543.



relating

relating to trusts, that <sup>s</sup> if a man buy lands, and take the conveyance in another's name, this is *a resulting trust* for him, to whom the purchase money belonged, *raised by implication of law*, and therefore saved by the statute, without any deed declaring it. The proof however ought to be clear, that the purchase money was really the property of him, who claims the estate.

VIII. As to that clause of the statute, which relates to contracts for goods, I have <sup>b</sup> before noticed the construction put on it in courts of law; and I find scarce any memorable interpretation of that part of the act in courts of equity, except that <sup>i</sup> the same principles seem adopted in both tribunals. But <sup>k</sup> it has been made a great question, and laid before all the judges of England, whether a contract for stock in the public funds, is within the statute, under the mention of goods, wares, and merchandises, so as to require the contract to be in writing, or money to be paid by way of earnest, and they were equally di-

<sup>s</sup> 2 Vent. 361. 1 Vern. 367.

<sup>b</sup> Ant. 150.

<sup>i</sup> Ant. 431. 3 Bro. 154 &c.

<sup>k</sup> 2 Wms. 308. Com.

rep. 354 &c.

vided in opinion. To prove such contra & within the statute, it was <sup>1</sup> said, “*merx est quicquid vendi potest*;” and a case <sup>m</sup> was cited, where it was expressly declared by lord chancellor Cowper, that a plea of the statute to a bill for performance of a contract for South Sea stock ought to be allowed. It has also been <sup>n</sup> laid down, that if indeed a contract for South Sea Stock be executed, a court of equity will not unravel or break into it; but if it be only executory, and a man come to have it specifically performed, there a court of equity will not aid the plaintiff, but leave him to such remedy as he can have by law. There is another general assertion, which seems inconsistent with the foregoing, and where <sup>o</sup> an agreement to transfer stock is compared to an agreement to surrender a copyhold, and it is said, that as a court of equity will compel a surrender, so it will also enforce a transfer. Courts <sup>p</sup> of justice however certainly gave way to colorable sales of stock in the public funds, which were merely wagering transac-

<sup>1</sup> Com. rep. 355.

<sup>m</sup> Ibid. 356, 7.

<sup>n</sup> Bunb.

135, 6.—See Bunb. 132, 3. <sup>1</sup> Wms. 570 &c. and n. 3 (4 ed.)

<sup>o</sup> 10 Mod. 498.

<sup>p</sup> See 2 Vez. 567.

tions,

tions, the ostensible vendor not having the pretended property to transfer. This was intended to be remedied by the <sup>1</sup> statute, intitled, “ an act to prevent the infamous practice of stockjobbing,” by which such agreements are made void, and penalties are inflicted on the contractors. That this law should have lain so dormant, considering the frequent occasions of enforcing it, may justly seem matter of surprise.

But in these few last remarks I have in some measure transgressed the intended limits of this lecture, which were to mention the construction, that has been given to the statute of frauds, in respect to suits in equity, touching the execution of contracts and agreements: a statute, that in a small compass affects almost every branch of our law respecting property: but the copiousness of judicial comments amply countervails the conciseness of the text. Courts of equity, as we have seen, have, with a liberality very laudable in general, made the letter submit to the spirit of this law.

In the next lecture I shall speak of such agreements as, by reason of fraud or other circumstances, independently of the statute we have been considering, ought to be cancelled or declared void, and of such in which a specific performance is ordained by the decree.

## LECTURE LVIII.

*Of cancelling or rescinding improper agreements,  
and of carrying others into specific execution.*

THE subjects of the present lecture afford frequent occasions of filing a bill and a cross bill in courts of equity, each party being alternately plaintiff and defendant, the one praying that an agreement should, for fraud, or other vitiating quality, be declared void, and be delivered up to be cancelled, the other seeking a specific execution. I shall therefore contemplate, as it were in one view, the grounds for rescinding agreements, and the cases, where a specific performance is enforced by the decree.

I. First we may attend to the *consideration*. An agreement, to be enforced in a court of equity, ought to have been made, either on a good or a valuable<sup>a</sup> consideration, such as that

<sup>a</sup> 1 Eq. ca. abr. 24. 1 Vez. 450.—A settlement made before marriage, in consideration thereof, is good against every one:

that of marriage. Therefore<sup>b</sup> articles entered into before marriage with the woman herself, and not with a trustee on her behalf, will be decreed, tho in law the subsequent marriage amounts to a release of the contract. Therefore<sup>c</sup> also tho a marriage portion, stipulated for, has never been actually paid, the court has decreed the execution of an agreement for a jointure, and of articles in favor of children. In regard<sup>d</sup> to marriage articles, by which a remainder over is proposed to be limited to a collateral relation, this distinction seems to have been taken, that if a father, who is to settle the estate, has the complete dominion over it, such collateral relation cannot compel a specific performance in equity; but if the father hath only an interest jointly with his son, on whose intended marriage the estate is to be settled, then there is a good *consideration* extending to a nephew, so as to effectuate a remainder designed for him, because that design might have induced the father to

one: if after marriage a settlement be made in consideration thereof, it is *voluntary* and fraudulent against creditors, who were so at the time, but not against those whose demands are of a posterior date, if the settler were then in solvent circumstances, or not engaged in trade. (Ambl. 121. 2 Bro. 92.)

<sup>b</sup> 2 Vent. 343.

<sup>c</sup> Ambl. 502, 3.

<sup>d</sup> 2 Wms. 255.

join

join in the conveyance ; whereas in the former case the marriage and portion support only the limitation to the husband and wife and their issue, for this is all that is presumed to have been stipulated for by the wife or her friends ; and the father having the whole property in the lands, there is here no other person, with whom he can be supposed to treat. Where<sup>e</sup> however marriage articles have been decreed at all, they have been decreed to be carried into execution, even as to collaterals, and not to be executed in part only.

An<sup>f</sup> agreement to settle boundaries, tho nothing valuable is given, implies a sufficient consideration extending to both parties, who have an interest in shunning contention.

Lastly, these<sup>g</sup> courts will never enforce an agreement founded on an illegal consideration, as that of stifling a prosecution for felony ; tho it may be good, if the indictment put an end to were only for a fraud, because matters of fraud are cognizable and relievable as well in equity as at law.

<sup>e</sup> 3 Atk. 189.

<sup>f</sup> 1 Vez. 450.

<sup>g</sup> 3 Wms. 279.

II. From the consideration I proceed to the *means* of obtaining agreements. A <sup>h</sup> contract shall not be enforced, if it were brought about by the suppression of truth, or the suggestion of falsehood. Thus<sup>i</sup> if a bill be brought for a specific performance, and the plaintiff have been guilty of any wilful misrepresentation, as by pretending that goods were valued at £.3500, when in fact the estimation was £.1000 less, this is a ground for dismissing his bill with costs. The<sup>j</sup> case is the same of *an industrious concealment*, greatly diminishing the value of the thing contracted for. Yet where<sup>k</sup> a man devised freehold lands, of which he was only seised in tail, to his younger brother, and a copyhold estate, of which he was seised in fee, to his elder brother, who was next remainderman of the intailed premises, and also the devisor's heir at law, and the two brothers, by writing under their hands, agreed, that each should respectively enjoy what was devised to him, the younger having produced an exemplification of a recovery for barring

<sup>h</sup> 1 Wms. 240.<sup>j</sup> 1 Bro. 440.<sup>i</sup> 3 Atk. 386, 7.<sup>k</sup> 1 Ch. ca. 84.

the intail, and it afterwards appeared, that no recovery, tho begun, was completely perfected, whereupon the elder wished to rescind the agreement, yet the court of chancery held him to his contract. Now this convention was plainly founded on mistake. The determination therefore, it seems, must be accounted for on the intrinsic merits and propriety of the agreement. For where <sup>1</sup> a contract is positively just and reasonable, not merely (negatively) exempt from injustice, the court will not set it aside on the suggestion of such causes, as might perhaps have been productive of an unjust and unreasonable bargain, but in fact were not, as that the party was in a state of <sup>m</sup> inebriation, or under the influence of paternal authority. But if by an abuse of confidence reposed, a trustee or other person derive profit to himself, such profit will be decreed to inure to the use of the party deceived and injured by the duplicity of his agent <sup>n</sup>.

Again,

<sup>1</sup> 1 Vez. 19. 2 Atk. 85. 5 Vin. abr. 538.

<sup>m</sup> See 3 Wms. 130 n.

<sup>n</sup> This seems to be the result of the great case of Fox and Mackreth, (2 Bro. 400—427; post 457 note <sup>1</sup>; decree affirmed in

Again, a subsequent ° *ratification*, where there is no *fear, fraud, or surprise*, may confirm even an unreasonable agreement, or what might have admitted of a question as to

in the house of lords, 14 March 1791, with £.200 costs) too full of circumstances perhaps to be a precedent in point, of frequent use; as it turned much on collecting the evidence of facts, not appearing, from those which did appear; but it shews in general, that courts of equity will on these occasions, weigh the circumstantial and presumptive proofs of fraudulent misconduct, as grounds for exerting this prerogative branch of their jurisdiction. The result of the evidence was of a different tendency in the case of Prestage and others against Langford and others, and *e converso*, in chancery, M. T. 11 G. III. A cross bill was brought to set aside a sale as fraudulent, a former bill having been brought for the specific performance of the agreement, and that a conveyance might be decreed. Upon hearing both causes together, it appeared, that Langford and his son, were, as auctioneers, employed by Mr. Duane, trustee for infant legatees, to sell a house, which was sold for £.4000, Langford's son and one Burnfall being the purchasers. It was objected, that more money might have been had for it by private contract, and several circumstances were heaped together in proof to induce a suspicion of fraud; in particular, that Burnfall, a few days afterwards, contracted to sell it again for the advanced price of £.4750. But the proof of fraud being judged defective, the court would not set aside the sale, merely from the circumstance of one of the auctioneers being buyer and seller too, but dismissed that bill: however without costs, in order, as was said, to discourage such suspicious transactions; and for the same reason, and also because the buyers could make such a profit of their bargain, costs were refused in the other cause, except in favor of Duane, but a performance was decreed, by lords commissioners Smythe and Bathurst. But it seems to be since thought, that if a person, employed to sell, become the buyer, this *alone* is sufficient to restrain the court from decreeing a specific execution. (2 Bro. 326 &c. 3 Bro. 120.)

° See 2 Bro. 415. 426, 7.

its fairness. Thus <sup>p</sup> articles entered into even by an infant during his minority may be enforced against him, if he do any thing to substantiate them after his full age. And where <sup>q</sup> a legacy depending on a contingency was parted with at a very under price, the court would have been willing to have set aside the transaction, as being an unreasonable advantage made of a necessitous man. But after the legacy became absolute, and he, who made the assignment, was *fully apprised*, that such transfer might be disputed, but nevertheless *freely* executed a deed of confirmation, it was thought by two successive chancellors too much to vacate the party's voluntary ratification of what he had a power to substantiate, as well as a right to rescind. The following case also applies to the present purpose. A <sup>r</sup> husband detecting an adulterer with his wife, and with a sword being about to slay him, the other professed, he would make reparation, and in another room gave a promisory note for one hundred pounds payable at a future day. At the time of payment he gave his bond for securing the money, and afterwards brought his bill to be relieved. The lord chancellor declared, that

<sup>p</sup> 1 Vern. 132. <sup>q</sup> 3 Wms. 290 &c. <sup>r</sup> 3 Wms. 294 note E.

if the matter had rested on the note, gained by a man armed from one weaponless, and by duress, tho it happened to be given for the greatest injury, (in which however the legal remedy is damages to be assessed by a jury) he should have made no difficulty of granting relief. But when afterwards the plaintiff had *freely* entered into a bond to the husband, he had thereby himself ascertained the damages, and ought not to be relieved. On the other hand, where ' there is any unfairness in obtaining the ratification of the former contract, it is considered only as a continuation of the first fraud, as a mere contrivance and colorable proceeding, and the court has said, " it is double hatching the cheat." The 'confirmation, in order to be effectual, ought to be exempt from those impressions and that influence, which wrought the former transaction.

III. It is not an objection to the execution of an agreement, that at the time of making it, the objects thereof were *uncertain and contingent*. Thus " where an estate was sold for a certain specified sum, and an annuity during the vendor's life, who died before any

• 1 Atk. 344.

• 3 Bro. 120.

• 1 Bro. 156 &c. : and see 2 Bro. 17, 18.

thing became due of the yearly payment; this contingent agreement was of the same validity, as if the value of the annuity had been computed and made a part of the price. Thus also where \* A. and B. had married two sisters, nieces and presumptive heirs of C, from whom they had great expectations, and the husbands by articles agreed, that what should respectively come to either of them from the uncle, should be equally divided, these articles were holden valid, and the mutual benefit of the *chance* was deemed a sufficient consideration. It seemed indeed to have some weight, that had there been no articles, and the uncle had made no will, the same equality of partition would have taken place by the disposition of the law, and that therefore to object to the agreement was to object to the rules of law. Where' likewise a defendant had given his bond to his daughter's intended husband, with a condition to settle on that marriage a third part of the real estate, which should come to him from his father, this contract, tho extremely hazardous and uncertain, was decreed to be performed *in specie*, and it was not thought enough to pay the penal sum expressed in the

\* 2 Wms. 182. 608.

† 2 Wms. 191 &amp;c.

obligation. So also <sup>2</sup> the court has decreed the specific performance of a contract in the nature of a wager, as where, during the great usurpation, it was agreed, in consideration of abating part of the price, that the assignee would reconvey, when the king and deans and chapters should be restored. These examples may illustrate the rule, that mere *contingency*, as to the subjects of the contract at the time of making it, will not prevent its being afterwards carried into execution.

IV. From the uncertainty we may easily pass to the *inequality* of the terms of a contract. It seems clear, <sup>2</sup> that such inequality, where there is no circumvention or other reason, is not sufficient, any more than the uncertainty, to rescind an agreement, and that losing, as well as more equal engagements, will frequently be enforced, or at least not vacated, by a decree. For if a person with his eyes open will enter into a hard or unconscionable bargain, equity will not relieve him on this footing only, unless he can shew fraud in the party contracting with him, unconscientious advantage taken of his distress, or some undue means made use of to

<sup>1</sup> 1 Ch. ca. 42.

<sup>2</sup> 2 Vern. 423. 1 Wms. 541. Amb. 18 &c. 2 Vez. 422, 3. Prec. ch. 206. 2 Atk. 251.—See 2 Bro. 167—179, and in particular the notes 176, 7, and 179, 180.

draw him into such an agreement. But indeed where agreements are endeavoured to be set aside for the supposed weakness of understanding in one of the contracting parties, for breach of confidence, or other substantive reason, the inequality of the terms may be a material ingredient in the case, as evidence <sup>b</sup> of imposition.

Here it may be remarked, that <sup>c</sup> if a female *infant*, under the age of twenty-one years, be married to a gentleman of great estate, and she have a jointure made to her of only one tenth of the value of his lands, whereas the right of dower extends to one third, notwithstanding this, as the law has intrusted <sup>d</sup> pa-

<sup>b</sup> See *Griffin v. De Veuille* and others, appendix, case the third.

<sup>c</sup> 3 Atk. 612. See 1 Bro. 106 &c. 2 Bro. 545, &c. and *Clough and others v. Clough and others* in chancery, 24th Feb. 1787; which was a bill on behalf of the infant children of the marriage, after the husband's death, against his widow, praying that marriage articles might be established and specifically performed, entered into before marriage by Patty Clough the widow, while an infant, and her guardians, for settling her estate and lands of the husband as therein mentioned: she by her answer insisted, that she had done nothing after her full age, affirming the articles, and that her estates were not thereby bound, waiving any right under the same in the lands of her late husband: the decree declared, that her estate was not bound by the marriage articles, and ordered that the bill should stand dismissed out of court without costs. (See 1 Bro. 115.)

<sup>d</sup> This principle seems questioned, 1 Bro. 112.

rents and guardians with the judgment of the provision to be appointed, she shall not set aside this transaction by reason of the great *inequality* between the dower and the jointure.

In some \* cases, where a plaintiff does not make out such a case as will authorise an absolute rescinding of the agreement, yet if the contract is very unreasonable or suspicious, the court will withhold its voluntary and discretionary aid, and will not decree specific performance, pursuing a middle line of conduct, and leaving the party to his remedy at law.

Most of the determinations, respecting the rescinding of exorbitant bargains, were cited in a great cause agitated in chancery, before lord chancellor Hardwicke, assisted with the advice of other chiefs of the profession. Mr. Spencer being about thirty years of age, received ~~five~~ <sup>2</sup> thousand pounds on condition of repaying ~~in~~ <sup>2</sup> thousand pounds at or within some short time after the death of the duchess of Marlborough, who was then seventy-eight years old, in case Mr. Spencer should survive

\* Prec. ch. 538. 2 Vern. 632. C. T. T. 234.

† 1 Atk. 301—355. 2 Vez. 125—160. 1 Will. 286—296.

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her, but not otherwise. Much depended on the particular matters in evidence, as that Mr. Spencer was of a broken constitution, that the offer proceeded from him, and other favourable circumstances too prolix to relate; on the other hand it was inferred, that as the transaction was to be carefully concealed from the duchess, there was a deceit and delusion upon her, from whom Mr. Spencer had great expectations, and who was *in loco parentis* to him, as the civilians express it. But this seems too impracticable a refinement to be admitted in forensic decisions. There had also been a voluntary *affirmance* of the contract, after the decease of the duchess, by Mr. Spencer. Upon the whole, the court declined to vacate the agreement: and indeed the marks of fairness, both in making and affirming the contract, were so strong, that nothing perhaps but a view to public utility could have occasioned much doubt.

V. From the reasonings in this case it may, I think, be inferred, that to make a contract *usurious*, which was argued upon as a ground for setting this aside, it must be either within the express words, or a shift and evasion to keep out of the statutes of usury: and that a

bargain on a mere contingency, where the reward is *bonâ fide* given<sup>s</sup> for the *risque*, and not for the forbearance of demanding the money, as a *loan*, is not usurious. For such reward cannot with any propriety be said to be given for the forbearance, when the day of payment itself may never come. Of this kind are *bottomree* bonds, or *fœnus nauticum*, by which the borrower obliges himself to pay the sum advanced, with a specified increase, on the safe return of a certain ship, but in case the ship perishes, then the lender is to lose his whole debt. One reason assigned, why a larger premium than the legal rate of interest is allowed in these naval mortgages is a regard to the encouragement of commerce. But the principal cause, why our courts of justice have not deemed such contracts within the statutes of usury, must be because the whole money is in hazard. For where six pounds per cent. is given for the interest of money as a loan, it will be of no avail, that the sum borrowed was to be employed in trade, unless the lender was to all intents a partner. But if the *risque* be extremely flight, and not the real object of consideration be-

<sup>s</sup> Seez Bro. 177.—So the grant of an annuity, agreed to be redeemable, seems not to be usury, because it is not a loan. (1 Bro. 93.)

tween the parties, but colorable only, and a device to evade the statutes, the contract will be considered as usurious in every court.

Farther it was said<sup>b</sup>, that to take advantage of another's necessity is equally bad as to profit by his weakness of understanding, as in either case he is incapable of making the right use of his reason. This doctrine is indisputable as a conscientious maxim of ethics. But it must be admitted with caution as a rule of forensic decision. It leads to a field too wide for juridical experience. To rescind every contract, incompatible with the nicest principles of honor and morality, tends to terminate all commercial intercourse<sup>1</sup>.

## VI. Another

<sup>b</sup> 1 Atk. 352.

<sup>1</sup> 2 Bro. 420. What is there said, refers, I suppose, to the lord chancellor's argument, 8th Dec. 1787, being one of the days that the cause of Fox and Mackreth was debated. (See ant. 447 note n.) His lordship then said, that "without adopting the expression of what had been called *technical morality*, he could not agree to the proposition, that every species of immorality or unfairness, or such conduct as a man of honor would disdain to pursue, was a ground of relief in a court of equity." He then put this case; if A. knowing that there is a mine on B.'s estate, of which B. is ignorant, buy the estate for half the value, a court of equity could not rescind this transaction. But on the head of confidence reposed and abused,—he said, "if A, *the greatest stranger in the world to B*, (who professes himself ignorant of  
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VI. Another consideration is, whether, supposing a transaction fraudulent or unfair, he that is *particeps criminis* can be intitled to any relief. And the answer is, that<sup>k</sup> he may be relieved, if not for his own sake, for the public utility. Neither of the parties to an obligation entered into for concerting a marriage, called a *marriage brocage bond*, is deceived or defrauded: yet the court relieves against this negotiation as a general mischief. So in

the value of his own estate) come to B. and say,—the estate is near me, I know the value of it, trust to me, I will give the fair value,—and impose on him; this fraud might be relieved against, because it is *contrary to the contract*, whereby the party had stipulated to declare his true knowledge of the matter.” [In the case of the mine there was no contract, whereby the party had undertaken to disclose his knowledge.] In another part of this day’s splendid and convincing argument, his lordship declared, “such stipulation need not be express: it was sufficient, if it appeared that the party, seeking relief, trusted to and relied on the representations of the other contracting party, so as to constitute him a special kind of trustee.” He seemed to lay down the rule without exception or reserve, “*that a common trustee cannot sell to himself*, but the ostensible vendee will become a trustee in his room, and that, without proof of fraud or under-value. But in the case of a special confidence reposed and abused, there must be proof of loss, it must not be *injuria absque damno*.” He added, “he hesitated on the danger, that might arise from the precedent, by applying the principles of this decision to rescind other contracts, and to render the traffic of mankind insecure. It was to no purpose to lay down definite rules of law, if the courts governed themselves by indefinite rules of evidence in respect to the construction put on the actions of men.”

<sup>k</sup> 1 Atk. 352.

bargains to procure certain offices, neither of the parties is unapprised of the terms; but it tends to introduce unworthy persons into public employments, and therefore for the  
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<sup>1</sup> Bro. 124, 5. *Harrington v. Du Chatel*, in chancery, Nov. 15th 1781. — This was the case of annuity bonds given for the groom of the stole's recommendation to the office of page to the king. According to my note of it, Mr. Madocks for the injunction argued, that it was like the case of marriage brocage bonds, and the other cases where the court relieves with a view to public policy. Mr. Erskine on the same side urged the turpitude of the contract, that the royal palace might by this means be filled with vagabonds; that the king was deceived in the object of his bounty; that Mr. Harrington being to pay over the whole emoluments, (for it appeared the annuities amounted to the income of the place) might be put on base designs against the honor of the crown; that such sale of offices was a misdemeanor at common law; that the groom of the stole was liable to an information in the king's bench for his breach of trust; and cited several authorities, especially C. T. T. 140 &c. and Burr. 2494 &c. Mr. Kenyon *contra* argued from the concessions on the other side, that if the king's bench would interfere criminally *a fortiori* that court, in its civil capacity, would deny the legality of the bonds; and then relief was not proper or necessary in equity. Mr. Graham on the same side argued on the little concern the public had, whether the king was served by one page of the back stairs or another: that it was not like offices respecting the administration of justice or the revenue: that if there were a deceit on his Majesty, it was in his private capacity. The lord chancellor said, that if a private person were to trust to another to provide proper agents for him, who being so intrusted should take a bribe for his recommendation, it would be a gross breach of trust. He seemed to disapprove of the distinction of the king's public and private capacity; which, he said, was of late date any where, and of no date in books of legal authority. The king's servants were noticed by the law, and intitled to various writs of privilege. He admitted, that if  
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(C) S. C. note well. 25th Aug. 1781

fake of the commonwealth the bargain is rescinded. Farther, when a creditor enters into an agreement with his debtor for a composition of ten shillings in the pound, provided the rest of the creditors agree, and at the same time makes a clandestine engagement for the whole of his own debt, this is no fraud on the debtor, but as it is a fraud on the creditors in general, who came into the proposal on a presumption, that the composition would be equal and without undue preference, the court has extended its relief.

VII. There is another sort of agreements, the rescinding of which is partly referred to principles of general policy, I mean, unconscionable bargains made *with young heirs*; under which description it was in vain attempted to reduce the case of Mr. Spencer. Many<sup>m</sup> of such contracts have been set aside, the court

the law would relieve, this was frequently mentioned as a *terminus* to this court's jurisdiction. But he said, this position was difficult to be reconciled with any adjudged cases, determined on the policy of the law; which he illustrated by examples. He inclined, that *turpis contractus* might be pleaded at law to a bond. But if this were uncertain, it was too much on that uncertainty to deny relief here. He therefore continued the injunction.

<sup>m</sup> 1 Ch. ca. 276. 2 Bro. 173.

penetrating through the subterfuges, which were artfully devised to veil the real transaction. For these<sup>n</sup> contrivances are framed to gratify licentious appetites on the one hand, and avarice on the other. If they were to be tolerated, a man might imagine, he was providing a liberal supply for a son or other near relation, when in fact he was laying up wealth for usurers and corruptors of youth. The impoverishment of young heirs, by affording the means of prodigality, is certainly a political evil in this country more especially, in which the unbiased and just influence of noble families forms an essential part of the constitution. To which may be added from the *senatus-consultum Macedonianum*, (so called from the usurer who gave occasion to it, and levelled against this practice) “*nullius posse filiifamilias bonum nomen expectatâ patris morte fieri.*” But these contracts, when they await the decision of the court, must depend on their special circumstances. It is not advisable to give too particular reasons for determining such cases. It might not perhaps be safe even to pass a new law: lest by positively

• 1 Atk. 342, 3. 351.

• Dig. l. xiv. t. 6. le. 1. in præfat.

pointing out what contracts should be void, improper inferences should be drawn in favor of such as were, in some degree only, of a different description. It was<sup>p</sup> laid down by the lord chancellor, in the abovementioned case of Mr. Spencer, that political arguments in the fullest sense of the word, as they concern the government of a nation, must be, and have always been, of great weight in the consideration of that court; and that, tho there may be no *dolus malus* in contracts, yet if the rest of mankind are concerned as well as the parties, it may aptly be said, that it regards the public utility. Now besides the several instances I have already cited, there are other contracts properly set aside from their dangerous tendency to the commonwealth. The only example I mean farther to allude to is analogous to the case of young heirs, and relates to dealings between guardian and ward. Thus<sup>q</sup> a present of stock, or an annuity granted, to a guardian or trustee by a young ward, lately come of age, will for the most part be set aside on reasons of public utility.

<sup>p</sup> 1 Atk. 352.

<sup>q</sup> 2 Vez. 547. See 1 Vez. 379. 2 Vez. 259. 2 Atk. 15. 25. C. T. T. 111. Griffin v. De Veulle and others, appendix, case the third: which relates to several of the topics in this lecture.

I have

I have stated the most obvious and familiar grounds of defeating the validity of contracts. Such as are not liable to any of these objections will in general be carried into a specific execution. This prerogative of courts of equity I have<sup>r</sup> formerly insisted upon as peculiarly characteristic of that kind of jurisdiction.— In a case near the end of Charles the first's reign, the court of chancery declared, <sup>r</sup> that it was warranted by the precedents and constant practice of that tribunal, where such agreements had been made, upon which the party could only recover damages at law, for that jurisdiction to decree the thing in *specie*: wherein it did not bind the interest of the *lands*, (tho<sup>t</sup> this now seems exploded as a scrupulous reserve or a slight evasion) but enforced *the party* to perform his own agreement. The<sup>n</sup> rule does not hold *e converso*, that where *no* action at law lies to recover damages on the breach of an agreement, *no* suit in equity can be maintained. For<sup>x</sup> example, if a woman under age, being seised in fee, on a marriage with the consent of her

<sup>r</sup> Vol. I. 205 &c.<sup>r</sup> 1 Ch. rep. 84.<sup>s</sup> See 1 Vez. 454.<sup>n</sup> 2 Freem. 246.<sup>x</sup> 2 Wms. 244. But see ant. 453 note c.

guardians,

guardians, should covenant, in consideration of a settlement, to convey her inheritance to her husband, and such settlement were competent, equity would execute the agreement, tho no action would lie at law to recover damages.

The most common *subject matter* of such contracts, as the court will decree to be specifically performed is real estate. For in general judges in equity will not entertain a bill for a specific performance of contracts of stock, corn, hops, or other articles of merchandise, that vary according to different times and circumstances, but will leave the plaintiff to his remedy at law. A <sup>2</sup> breach of the

<sup>1</sup> 3 Atk. 384. Ant. 434 note u.

<sup>2</sup> 3 Atk. 512. 1 Vez. 12.—Whistler v. Mainwaring and others. In chancery, Mich. Term. 1773. 14 G. III. A bill was brought on a covenant to put into repair and to keep in repair certain demised premises. The covenant charged the covenantor, his heirs and assigns; and so *ran with the land*: (ant. 87. post 472.) the covenantor was dead two years before the suit was commenced. There was evidence, that the premises were in tenantable repair at the death of the covenantor, and inhabited by the lessee, besides the presumption of their being put in repair at the time of the lessee's entry, arising from his acquiescing seven years from the time of such entry to the commencement of this suit without proceeding on the covenant. The solicitor general argued for the defendants, that if the covenant had been only to put in repair, and so might have been satisfied by a single act, still the remedy would have been proper at law; *a fortiori*, where this court cannot do final justice on a covenant to  
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the common covenant to *repair* demised premises is considered in much the same light, and as proper only to be redressed by action at law. But on a covenant to *rebuild*, as it was holden by lord chancellor Hardwicke, the landlord or lessor may come into chancery for a specific performance, if he is in due time, and no constructive acquiescence can be imputed to him. This <sup>a</sup> doctrine however has very lately been controverted, and perhaps entirely overruled, by the late lord chancellor. In respect to acquiescence, <sup>b</sup> a specific execution of agreements will sometimes be decreed, tho the time of performance is elapsed; especially if the nonperformance was not incurred by any default of the party seeking relief. As if in the sale of an estate, it be strongly stipulated that the price shall be paid by a certain day, which elapses without payment, still the contract may be enforced; for the general rule is not to consider the time as of the essence of agreements. Yet <sup>c</sup> the actual payment on the

*keep in repair*, but there must be repeated applications. Mr. Bicknell on the same side observed, that the bill prayed an issue of what might just as well have been tried at law without coming into this court. Some of the defendants were purchasers of the reversion. The bill was dismissed generally with costs.

<sup>a</sup> 3 Bro. 167: <sup>b</sup> 1 Vez. 450. <sup>c</sup> See 1 Ch. ca. 110, 1.

day prefixed may sometimes be highly important to the party, and his sole motive for entering into the contract at all; and by the failure he may incur irreparable loss. Such special cases may form discretionary exceptions to the rule. Indeed this whole branch of judicature, respecting the performance and rescinding of agreements, seems more of the discretionary kind, than any other. Some leading principles may be laid down, but those subject to exception; and an unforensic and inevitable latitude must often be allowed of, and the special circumstances of each case respectively must be weighed, in forming a proper and just decision.

It is a very important concern, that in contracts proper for a specific performance, equity considers them often as<sup>d</sup> actually performed, before the decree for that purpose. As<sup>e</sup> where a man articles to buy land, this gives the party contracting for the purchase an equitable interest in such land, which he may devise, even before the day, on which the conveyance is to be made, provided the articles

<sup>d</sup> But see 1 Bro. 237.

<sup>e</sup> 2 Vern. 679. 2 Wms. 629. 1 Ch. ca. 39.

be antecedent to the will, but not otherwise. After<sup>f</sup> such contract, the vendor stands seised in equity in trust for the vendee; and therefore the execution of it shall be decreed against a subsequent purchaser, who has notice of the prior agreement. The vendor also may come into the court of chancery for a specific performance of the contract of sale, and to have the money paid, as well as the vendee. In<sup>g</sup> these cases it is sufficient to answer the end, if at the time for effecting the conveyance, the seller can make a good title; and it is not unusual for the master's report to certify, that if a third person join in conveying, the title will be good. For the direction of the court is to inquire, whether the seller can, not whether he could at the time of entering into the articles, make a clear and unimpeachable title to the premises affected by the contract. The court being thus open to both the contracting parties, it is reasonable to anticipate the force of a decree, by considering the vendee in possession of the estate before it is conveyed to him, and the estate as actually converted into money and part of the personal property of the

<sup>f</sup> 1 Ch. ca. 212.<sup>g</sup> 2 Wms. 630, 1.

vendor. And as <sup>h</sup> lands articted or devised to be sold are reputed in the light of money, so money articted or bequeathed to be invested in land has in equity many of the qualities of real estates, and is discendible according to the same rules and canons of inheritance. But he, who is intituled to such money as tenant in tail, with remainder or reversion to himself in fee, may elect to take it as money or land; according to his determination <sup>i</sup> appearing by slight evidence of intention, provided <sup>j</sup> he be of full age, it shall subsequently go to his heir or executor; and, it seems, he may <sup>k</sup> bequeath it by a will, not attested by three witnesses, according to the requisition of law, in devises of real estate.

Where the specific execution of a contract takes place in courts of equity, it is material to consider *for and against whom*, and *how*, such performance will be decreed; both which points indeed have already been in some measure unavoidably touched upon.

I. If <sup>l</sup> articles of sale of lands be to be car-

<sup>h</sup> 1 Wms. 172. 470. 2 Wms. 171. 3 Atk. 447. 3 Wms. 211 &c. 1 Bro. 223—238.

<sup>i</sup> 1 Bro. 236, 7. Ambl. 229. j Ambl. 242. 2 Bro. 57.

<sup>k</sup> 1 Bro. 236.

<sup>l</sup> 2 Wms. 632.

ried into execution after the vendee's death, his executor must pay the money as a debt, but the estate will be conveyed to his heir. It is <sup>m</sup> said, "that a man, marrying the executrix of one, who makes an agreement, shall be as far bound as the original contractor:" and "that an agreement for a custom shall bind a purchaser or heir:" from which concise doctrines we can only infer, that regularly, and without adverting to particular occurrences, representatives are bound to a specific performance of the contracts of their principals. Those however, who are not parties to an agreement, and do not make their claim wholly from any party thereto, but have an independent and substantive interest prior to the contract, will not be bound by it. Heirs in fee simple, and alienees with notice of the preceding agreement, are bound, because their claim is wholly derived from one of the parties to the former contract. But <sup>n</sup> if tenant in tail mortgage without levying a fine, the issue in tail will not be decreed to confirm the estate of the mortgagee. So <sup>o</sup> if a man, seised

<sup>m</sup> 1 Toth. 4. 5.<sup>n</sup> 1 Lev. 237.<sup>o</sup> 9 Mod. 19. 2 Vez. 634. Where this is said to have been

of an estate tail with or without remainder over to a stranger, contract for mortgage or sale, receive the money, and die without levying a fine in the former instance, or without suffering a recovery in the latter, tho<sup>p</sup> he was bound himself, yet the court of chancery will not carry the agreement into execution against the issue or remainder-man in tail. The ground of which is that the issue in tail or remainder-man claim *per formam doni*, from the creator or author of the estate tail, and therefore, tho in the power of the tenant in tail to be barred by a particular conveyance, that not being done, the court cannot take away a right, which they derive not from the tenant in tail, but from the original donor. Upon the like foundation, I apprehend, it was, that<sup>q</sup> where a copyholder for life agreed, that J. S. should enjoy the premises during his (the alienor's) life, and the widowhood of such woman as should be his relict, and the custom was, that the widows of copyholders for life should be entitled to the kind of copy-

been the case of a Mr. Savil, who, when tenant in tail, chose rather to live in jail, and to be served in plate there, than to perform his agreement.

<sup>p</sup> 1 Ch. ca. 171, 2.

<sup>q</sup> 2 Vern. 45. 63.

hold dower called *free bench*, the court dismissed a bill brought by the purchaser, and refused to bind the widow by this agreement; at the same time putting this case, that if a jointenant agree to alien, and do not accomplish his engagement, but die, it would be a strange decree to compel the survivor to perform the agreement. These decisions flow in the same channel, and this is common to them all, that the contractor had not a pure and absolute interest in the lands. For 'a defective security will be aided in equity, where he that made it had a right to bring a complete charge upon the land, without the effect of a fine or recovery.

It may be a frequent topic of debate, whether the performance of contracts ought to be decreed where the business is carried on by *agency*. If 'the party undertaking for and on the behalf of a pretended client have no authority from his principal, there it is a fraud, and the undertaker ought himself to be liable. But where a due authority is given to treat, this is only acting for another, and factors or brokers acting for their principals were never

' 2 Vern. 151.

• 3 Wms. 279.

holden to be liable, in their own capacities, to the other contracting party. The case of principal and agent as between themselves is different: they are mutually liable to actions at common law; and where that remedy is attended with trouble and circuitry, courts of equity will in some instances extend relief. Thus where<sup>t</sup> a man contracted to pave the streets of a town, by a written instrument executed between him and two of the parishioners, the court of exchequer decreed him relief against these undertakers, and left them to their remedy over against the rest of the parish, more especially indeed as the written contract, which was the plaintiff's evidence, was in the hands of one of the defendants. But the<sup>u</sup> same doctrine of making the immediate contractors, where many are concerned in interest, liable to the party contracted with, has prevailed in recent determinations.

Under this head it must also be recollected, that there are<sup>w</sup> covenants, which are said to *run with the land*; and which therefore may be decreed for and against the successive own-

<sup>t</sup> Hard. 205.      <sup>u</sup> 1 Bro. 101 &c. and n.

<sup>w</sup> Ant. 464 note z.

ers of real estates. Thus \* where a grant was made of a watercourse through the land of the grantors, who covenanted for themselves, their heirs and assigns, from time to time, to cleanse such watercourse, which came by mesne assignments to the complainant in the cause, and the land in like manner to the defendant, and the bill was for establishing the enjoyment of the said watercourse, and that the defendant and all claiming under him might, from time to time, cleanse the same according to the covenant, the court was of opinion, that this was a covenant, which ran with the land; and that tho the plaintiff had cleansed the same, whilst it was easy to be done, and of little charge, yet since the right was plain, and the cleansing made more chargeable by a building newly erected, it was reasonable to fix it on the defendant; and such was the decree.

II. As to the inquiry *how* the performance of agreements is decreed, sometimes it seems necessary, <sup>y</sup> that an agreement should be exe-

\* 1 Eq. ca. abr. 27.

<sup>y</sup> 1 Vern. 199.—A performance, in substance, seems to have been at all times generally available at common law. (Pl. 291.)

cuted according to equitable construction, in pursuance of the intent of the parties, and not according to the strict letter of the stipulations: in like manner, as we have formerly<sup>2</sup> seen, in an action at law, a breach of covenant cannot always be set forth in the very words of the deed, but the effect and meaning thereof must be pursued.

Commercial<sup>3</sup> contracts are expounded in all courts according to the usage of trade.

Marriage<sup>b</sup> articles are the principal object of disquisition under this head. In decreeing the execution of them, and prescribing the settlement to be made, the court does not always scrupulously regard the legal operation of the expressions. The general example is, where lands are covenanted to be settled on the heirs of the bodies of the husband and wife; in this case a *strict settlement* will be decreed: for otherwise the husband and wife might defeat the claim of the issue; and as to them the provision would be nugatory. If the set-

<sup>2</sup> Ant. 90, 91.

<sup>3</sup> 1 Vez. 450.

<sup>b</sup> Gilb. lex prætor. *sub initio*. C. T. T. 20. 2 Wms. 356.  
n. 1. (4th ed.) 1 Fearn 124—(155, 6)—164. (4th ed.)

tlement

tlement be formally drawn before marriage, and any thing contained in the original agreement be omitted, it will be presumed to have been waived, unless it can be proved to be left out by fraud or mistake. But if the settlement be after marriage, there it will be controled by the articles, and made conformable to them ; because the foregoing presumption cannot then take place. However tho both articles and settlement are previous to the marriage, yet if the settlement refer to the articles, and be professed to be made in pursuance thereof, (which removes the supposition of the parties having come to a new and different agreement) the settlement will then be made conformable to the intent of the parties in the articles, but still not to the prejudice of purchasers, for a valuable consideration, and without notice,

Thus I have attempted an abridgment of the leading principles, with some of the exceptions, which govern courts of equity in decreeing the specific execution of contracts;— a prerogative so peculiarly appropriated to those

those tribunals, that<sup>e</sup> altho the king in his privy council exercifes judicial magistracy over the plantations, yet it was holden, that that judicature could not ordain performance of an agreement for settling the boundaries of two provinces in America, but the suitors were remanded to the equitable jurisdiction,

5 1 Vek. 447.

LECTURE

## LECTURE LIX.

*Of testamentary causes.*

**I**F the validity of a will of lands be disputed, as being a forgery, or for want of sanity in the devisor, for fraud or undue influence and control, the determination of the issue must be in a court of common law, by the verdict of a jury. The probate of wills of personal estate is conceded to the spiritual judge. Altho it is one of the prerogatives of the court of chancery to correct matters of fraud, and to dispense adequate relief, yet<sup>a</sup> a will cannot be set aside there for fraud, imposition, or undue influence, without the intervention of a jury, because a will of personal estate may be set aside in the ecclesiastical court for such practices, and of real estate, at common law. The<sup>b</sup> reason is, that the *animus testandi*, which is essential to the making of a will, is wanting in these cases; consequently the question is properly before those tribunals respectively, as it amounts to no more than this, whether in fact

<sup>a</sup> 8 Vin. abr. 167, 8 and marg. 3 Bro. parl. ca. 358 &c.

<sup>b</sup> 2 Atk. 324. 434.

there

there really be any devise or bequest. In<sup>c</sup> regard therefore to real estate, it is frequent for the court of chancery to send an issue of *deviseavit vel non*, as it is barbarously expressed, to be tried by a jury. It<sup>d</sup> is however laid down, that altho that court, or a court of common law, cannot, in an adversary way, determine the validity of a probate of a will or codicil, yet if it come there on an incident in a

\* Blunt v. Swinneton in chancery, 20th December, 1774. On a bill to establish a will and for a perpetual injunction against the heir at law, the case was, there had been two verdicts both in favor of the will, but the first against the express opinion of Mr. J. Nares, and the second by a special jury, equally to the dissatisfaction of Mr. J. Ashurst, who fully reported the evidence. Two wills were found wrapped in the same paper; in the former the testatrix had made her brother and heir at law her principal devisee; this was dated in 1751; the other was of a much later date and was in favor of the plaintiff, being the will in dispute; on which the testatrix had written to the following effect; "this is not my will, but the will of Mary Blunt; my true will is wrapped in the same cover &c." It was agreed, this superscription would not amount to a revocation, and it was only used as evidence of influence and imposition. It appeared very strongly by other proof, that the testatrix was extremely under the influence and control of Mary Blunt, who was her servant. The foreman of the jury, in giving the second verdict, assigned the reason for it; viz. that the jury thought, tho the testatrix was under the influence of the plaintiff, yet she was not so absolutely under her influence as to avoid the will. A motion was now made, for a second new trial; which was directed, on payment of costs as between attorney and client.

<sup>d</sup> 1 Atk. 630.

cause, and that incident be admitted by the parties, the chancery or a legal court may determine it, and hold the parties bound by their admission. And if either of the parties should afterwards commence a new suit in the ecclesiastical court to contest that determination, there would be sufficient ground for granting a perpetual injunction. Moreover, when the fact of a will duly executed remains undisputed, still abundant room is left for interposing the jurisdiction of our courts of equity.

I. Devises of legal and of trust estates have the same construction in courts of equity. This uniformity respects, first, the incidents, properties and consequences of the estate. Secondly it has regard to the allowed measure of the limitations, viz. the impossibility of tying up the estate beyond a certain boundary, thus excluding all tendency to a perpetuity. For example, <sup>f</sup> it being an established rule, that there cannot be a remainder over

\* Vol. II. 297 &c.—As to the means, by which an estate clothed with a trust, may be discharged thereof, see *Cockayne, an infant, v. Eyles and others*, in chancery, 16th and 17th Dec. 1771. The wills, deeds and facts are too prolix for insertion.

<sup>f</sup> Vol. II, 239. 243, 4. 8 Vin. abr. 451.

after

after a *quasi* estate tail in personal effects, as in a lease for years, words creative of an estate tail will vest the whole property therein, if the person intitled once come *in esse*; and the same rule obtains with or without the intervention of trustees in the devise. Here then the uniformity of construction in courts of law and equity plainly respects the measure, which limitations are not allowed to exceed: Thirdly the same analogy, between legal and trust estates, prevails in the construction of the interest devised, (as whether it shall amount to an estate of inheritance or for life only,) provided the trusts be *executed*, fully limited and declared, and not *executory*, merely, that is, not having an express and direct prospect to a future conveyance. It is true, there<sup>s</sup> are *dicta* to the contrary effect. It is true also, that <sup>h</sup> Mr. Fearne's reasoning (viz. that trusts were independent of tenure) applies to trusts indiscriminately: and that in enforcing the distinction between legal estates and trusts, he repeatedly adds<sup>i</sup> *executory at*

<sup>s</sup> Burr. 1108. 1 Vez. 152.

<sup>h</sup> 1 Fearne 143. (4th ed.)

<sup>i</sup> Ibid: and 2201.

*least.* But we must not hence infer, that the learned author thought, the distinction *was* maintainable between legal estates and trusts *executed*. For he elsewhere <sup>k</sup> cites several authorities, which shew, that, in such cases, a strict analogy of construction must be observed. On the other hand, if <sup>l</sup> the trusts be executory, imperfect and incomplete, a difference of construction may be allowed, in order to effectuate the intent of the deviser. As where <sup>m</sup> a sum of money was bequeathed to be laid out in lands to be settled on A. for life, without impeachment of waste, remainder to trustees to support contingent remainders, remainder to the heirs of the body of A, remainders over, with a power to A. of jointuring, it was decreed that A. should have but an estate *for life* in the lands to be purchased, tho in the case of a legal estate or a trust executed, he would have had an estate tail: because <sup>n</sup> in executory trusts something is left to be done; and the trusts may be executed, in the future conveyance, to which a prospect is had, agreeably to the intent, with more accurate exactness analogous to the<sup>o</sup>

<sup>k</sup> 1 Fearn, 208, 9. 215, 6. (4th ed.) <sup>l</sup> Ibid. 206 &c.

<sup>m</sup> 2 Wms. 471 &c. <sup>n</sup> C. T. T. 19. <sup>o</sup> Ant. 474, 5.

manner of decreeing marriage articles, before noticed.

II. As wills are frequently brought before courts of equity, where trustees are to vest money in the purchase of lands to be settled, so on the other hand the same jurisdiction is resorted to, where the devisor expressly directs *his real estate* to be sold for the payment of debts, legacies and portions. Debts <sup>p</sup> and legacies may also be charged on land by implication; as if a man by his will ordain that his debts and legacies be first paid, and then make a disposition of his real estate. These considerations may draw our attention to the division of *assets* into *real* and *personal*, *legal* and *equitable*.

<sup>p</sup> 2 Vern. 708, 9. 1 Vern. 411. C. T. T. 110, 1. 3 Wms. 91 &c. 3 Bro. 347, &c. Debts, subsequent to the will, are included: (2 Atk. 274. 3 Atk. 202. Ambl. 556.) and those barred by the statute of limitations. (Sal. 152. 2 Vern. 141, 2. 2 Wms. 374.) Otherwise, as it seems, if debts be particularly scheduled. (3 Lev. 433.) If a testator charge all his worldly estate with his debts, copyholds, unsundered to the use of his will, are chargeable *pari passu* with the real property: (3 Wms. 96.) but simple contract debts so charged seem generally not to carry interest, for their nature is not changed. (1 Wms. 239 n. 1. 334. n. 1. 4 ed.)

Lands

Lands descended in fee simple were always real assets for satisfaction of specialty creditors. Even an <sup>a</sup> advowson so descended is *real* assets. And a very just <sup>r</sup> act of parliament, formerly noticed, (reciting that it is not reasonable or just, that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts) therefore makes void, as against specialty creditors, all devises of real estates, of which the devisor was seised in fee simple, in possession, reversion, or remainder, or of which he had a power of disposing by his last will. But the same statute <sup>r</sup> makes valid devises for payment of debts, and for raising portions for younger children in pursuance of a marriage contract, made before marriage. In such case, bond creditors must take the estate as it is given to them, and be satisfied *pari passu* with those by simple contract. But by this law, freehold interests, devised *otherwise* than for the just purposes aforesaid, are become real assets, *at law*, (and without resorting to a court of equity) in favor of bond creditors.

<sup>a</sup> 3 Wms. 401.

<sup>r</sup> 3 W. and M. c. 14. Vol. II. 376. note 2. See 2 Bro.  
614.

<sup>r</sup> § 4.

As to *personal* assets, the testator's whole property of that kind, bequeathed or not, is assets both in law and equity, to which creditors, by simple contract or of any higher order, may have recourse for satisfaction of their demands. But<sup>1</sup> tho a man cannot exempt

<sup>1</sup> 3 Wms. 325. See 2 Bro. 614. Bunb. 302; 3. n. In chancery, July 18th 1774, Roger Kynaston, plaintiff, Victoria Kynaston, widow, and others defendants. The bill was brought by the devisee in remainder of the real estate against the testator's widow and executrix, to have the personal estate first applied in payment of debts &c. The testator by his will "charged his estate with his debts, legacies, and funeral expences; and, that his debts and legacies might be paid as soon as possible, devised particular estates to trustees, in trust to sell and discharge a mortgage due to one of them, and all other his debts, legacies, and funeral expences; and devised to his wife, the defendant V. K. all the rest and residue of his real estate for life, without impeachment of waste, and likewise all his personal estate whatsoever, and from and after her decease to his brother the plaintiff R. K. (the testator's heir at law) *and his heirs* for ever, and appointed the defendant V. sole executrix." Lord C. made three questions, observing that it had been very diligently argued at the bar, but he thought it a plain case. 1. Whether the wife shall have the whole personal estate unapplied for payment of debts. He admitted, that the personal estate is the natural fund, but might by express declaration be exempted. Here the expressions were strong enough for that purpose: For the whole personal estate was given to the wife, and the real estate was devised to trustees to be sold to pay *all* his debts, and he expressly enumerated funeral expences, which were the first thing to be paid. This construction was fortified by the facts. The estate to be sold was worth £.33,000, and the debts amounted to £.16,000: whereas the personal estate was worth only £.2000, part of which the wife was intitled to under her marriage settlement. He therefore decreed the whole personal estate

empt his personal effects from payment of debts, as against the creditors themselves, (for it is called the natural fund) yet he may as against the devisee of his real estate by using clear and explicit words.

The " rule in equity is, that, in case even of a specialty debt, the personal assets shall

estate to the wife, citing *Wainwright v. Bendlowes*, 2 Vern. 718, 9. 2. The second question was, whether the words " rest and residue" should be confined to an estate not devised to be sold, or extend also to the ulterior interest in those to be sold after satisfying the trusts. The legal estate was wholly in the trustees; this respected the remaining equitable interest after debts paid; which if it be not particularly disposed, would clearly go to the heir as a resulting trust. But he thought these words sufficient to include both any estate not before devised, and those particularly devised to be sold, citing *Thompson v. King*, decreed 1739. 3. The third question, which he treated as rather more difficult, was whether the wife should have the whole personal estate absolutely, or for life only. He thought there was nothing to confine it to the term of her life, and observed that when he gives over the rest and residue &c. and after her decease to the plaintiff, tho he inserts the word " heirs," he omits the words executors and administrators, and here cited the case of *Richards v. Baker and others*, 2 Atk. 321 &c. Therefore he decreed (among other things) that so much of the bill as sought an account of the testator's personal estate &c. and so much thereof as sought that the plaintiff should be let into possession of so much of the real estates particularly devised to be sold as should remain unsold after the trusts performed, stand dismissed: and declared, that the defendant V. K. was intitled for life to the rents and profits of such parts of the estate devised to be sold as should remain unsold.

" 2 Atk. 426. 430. 434.

be first applied, and if deficient, and there be no devise for payment of debts, the heir shall then be charged for assets descended. For lands are in equity a favored fund. Inasmuch that<sup>v</sup> the heir at law or devisee of a mortgagor may demand to have the estate mortgaged by such devisor himself and not by an ancestor, cleared out of the personalty. And a<sup>v</sup> specific devisee of a mortgaged estate is intitled to have it exonerated out of real assets descended. But at law there is no such distinction of favor shewn to lands: a bond creditor, may, if he please, proceed immediately against the heir, without suing the personal representative of his deceased debtor. As to the order, in which real assets shall be applied in equity for payment of debts, (after exhausting the personal effects, supposing them not exempted) the<sup>\*</sup> general rule is first to take lands devised simply for that purpose, then lands descended, and lastly estates specifically devised, tho so devised, expressly charged with debts.

*Equitable assets* are such as at law cannot

<sup>v</sup> Vin. abr. t. Heir. U. pl. 3, 5. See 1 Bro. 58 &c. 1 Atk. 487, 8.

<sup>v</sup> 2 Atk. 430—439.

<sup>\*</sup> 2 Bro. 263.

be reached by a creditor, as <sup>y</sup> a devise, in trust to pay debts, of an equity of redemption subject to a mortgage *in fee*, or where the descent is <sup>z</sup> broke by a devise to sell for payment of debts. One exception to the power of resorting to what might seem equitable assets occurs, when money by a marriage agreement is articted to be invested in land. Such <sup>a</sup> fund is not assets for payment of debts, contracted subsequent to the articles, in equity any more than at law. The importance of the distinction has been before intimated, viz. that <sup>b</sup> equitable assets are distributable between

<sup>y</sup> 1 Vern. 411. 1 Ch. ca. 128. n. 2 Atk. 290 &c. 1 Bro. 135 &c. 2 Wms. 415, 6. n. 2. (4th ed.) where the cases are noticed, as to such devises to executors. 2 Freem. 42. 2 Bro. 94. But lands so devised subject to a mortgage for years are *legal* assets, (2 Atk. 294. See 3 Wms. 341, 2. and n. 1. 4th ed.)

<sup>z</sup> See 1 Wms. 430, 1. 2 Atk. 290 &c. A devise to pay debts out of the profits seems equivalent to a devise to sell for the purpose of converting the estate into equitable assets, 1 Bro. 312; but see 2 Vern. 718. 2 Bro. 614.

<sup>a</sup> 3 Wms, 217.

<sup>b</sup> C. T. T. 220, 1. Where there are assets of each kind, see 3 Wms. 344. n. 3. (4th ed.) C. T. T. 220. It is said, (2 Freem. 270.) that where lands are devised to pay debts and legacies, the latter shall be paid in proportion with simple contract debts. It seems also, that a devise to pay debts and *legacies*, takes the case out of the statute. (2 Vez. 587 &c.) This perhaps must be understood, where there is enough to pay all the *creditors*. For otherwise, and if the legatees are to be let in, the devise affects to provide for the creditors in an impracticable manner, (2 Bro. 614.) and appears fraudulent, within the intent of the law, as to creditors by specialty.

creditors *pari passu*: but in the distribution of legal assets, where courts of equity have only a concurrent jurisdiction with the legal tribunal, they will not take away the legal priority: and as against judgment creditors, a debtor cannot convert his estate into equitable assets, such debts being in their nature an immediate charge on the land.

The foregoing observations tend to the better understanding of the *marshalling of assets*, which seems to have begun in this manner. If<sup>c</sup> bond creditors, who may come upon the real estate, will yet take satisfaction out of the personality, sweeping away the only fund, which the simple contract creditors could resort to at law, equity will, for the benefit of the latter, substitute them, as it were, in the place of the former, and will charge the real estate to the amount of the personal estate taken in execution by such bond creditors. This is called *marshalling of assets*; which may also be done in favor of legatees. As<sup>d</sup> where the real estate is devised for payment of debts, and nevertheless the

<sup>c</sup> Franc. max. eq. 11. marg.

<sup>d</sup> 2 Wms. 81. 3 Bro. 351, 2. n.

creditors exhaust the personal assets, (as they may, for neither the debtor nor the court can narrow their security) the legatees will in chancery be decreed to be satisfied out of the land, to the amount of what the creditors have so taken out of the personal effects. Chief baron Gilbert writes\*, that if bequests are given not to younger children, but to collateral relations or *volunteers*, that is such as have no consideration particularly meritorious (in regard either to natural affection, or honest equivalent) in their favor, and for whom the testator was not obliged by the law of God and nature to provide, there is no marshalling of assets for the benefit of such legatees. But that distinction, I believe, is wholly without foundation. On the contrary it appears, that where a bond creditor, or any other creditor intitled under the will to seek satisfaction out of the real estate, has swept away the personal assets, general pecuniary legatees,† without discrimination, may have relief out of the lands descended, as against the heir, by how

\* Lex prætor. 308.

† 1 Wms. 678, 9. 3 Wms. 323, 4. 2 Atk. 437.

‡ But the court will not marshal the assets, on behalf of charitable legacies, and in elusion of the statute of mortmain, 9 G. II. c. 36, (Ambl. 615, 6. 704. 715.)

much

much the personal estate is lessened by the payment of such debts. For the <sup>h</sup> election of the creditor will not determine, what shall ultimately be the fund charged. The rule always was to favor the heir by descent by marshalling the assets on his behalf, and making the personal effects liable in the first instance, where there was a devise of lands for payment of debts. That <sup>i</sup> great founder of systematical equity, lord Nottingham, first introduced the same indulgence in favor of a *hæres factus* or devisee of land, and has been implicitly followed by successive judges in that court.—Concerning the marshalling of assets I have adverted chiefly to the more general points. The cases are complex and difficult to be properly abridged. They are <sup>k</sup> founded on extensive principles of equity, tho in particular instances they may create seeming hardship, and specious matter of complaint.

III. I shall next take notice of those occasions, where courts of equity will *put a devi-*

<sup>h</sup> 2 Atk. 438.

<sup>i</sup> 2 Ch. ca. 84. 2 Atk. 436. 2 Bro. 263.

<sup>k</sup> 2 Atk. 439. See 2 Vern. 183. 1 Wms. 228 &c. and n. (4th ed.)

*see*

*fee to his election* either of renouncing all benefit under a will, or of not setting up a title in derogation of any part of it. In 'a leading case on this subject it was holden, that if a testator, disposing of his estate among his children, devises to one fee simple lands, and to another lands intailed, it is upon an implied condition, that each party acquit and release the other; and such devisees ought to acquiesce in the will, or renounce any benefit thereby. So also<sup>m</sup> where an ancestor, previous to his marriage articted to settle lands in such words as would in equity call for a strict settlement, then made a deed not pursuant to that intent, and had issue a son and two daughters, and on his son's marriage settled other lands in the usual manner, and then having levied a fine of the former to himself in fee, devised part of them to his two daughters, and the rest to his grandson in strict settlement, the lord chancellor decreed, that the grandson, six months after he came of age, should be put to his election of abiding by the will, or if he insisted on the articles, then so much of the other lands devised to him as would amount to the value of the lands com-

1 2 Vern. 582.

■ C. T. T. 176 &amp;c.

prised in the articles, and which were devised to his two aunts, to be conveyed to them in fee, it being a tacit condition annexed to all <sup>a</sup> devises of this nature, that the devisee do not disturb the disposition, which the devisor has made. And the <sup>o</sup> rule extends to a personal as well as a real estate taken under a will. For the same doctrine was adhered to in the case of a copyhold estate, devised to an heir at law, for life with remainder over, such heir being also under the same will residuary legatee of a large surplus of personal estate. It did not clearly appear, that the copyhold had been surrendered to the use of the will: yet it was holden, that the devisee in this case enjoying a benefit under such will was bound to a total acquiescence. In one of these instances, however, the devisor had the legal estate in fee, in another he <sup>p</sup> might have surrendered to the use of his will, and in the other he might have levied a fine or suffered a recovery,

<sup>a</sup> It appears also, that if a party has a prior claim by will or otherwise, and a subsequent one by *deed*, he cannot claim under the latter without confirming the whole of it. (3 Bro. 285, 6. n.)

<sup>o</sup> 1 Vez. 234, 5.

<sup>p</sup> Ambl. 430 &c. In devising an equity of redemption in copyholds there is no need of a surrender, and indeed can be none. (3 Wms. 360. n. 1. 4th ed.)

and

and thus acquired an absolute power of devising: so that in <sup>a</sup> all of them the intent was clear; and the testator might entertain a reasonable supposition, that his will would be acquiesced under. So where <sup>r</sup> a testator's intention, of making a satisfaction for his widow's claims of dower or under a settlement, is plainly manifest, she shall be put to her election, which she will accept, her rights independent of the will or the benefit thereby provided. But <sup>s</sup> such intention must be express or otherwise free from ambiguity, and cannot, it seems, be inferred from a testator's making a general disposition of *all* his property, because his estate is not his to give <sup>t</sup> exempt

<sup>a</sup> C. T. T. 182.

<sup>r</sup> Ambl. 466, 7. 682, 3. 730 &c. 1 Bro. 186, 7. 481, 2. 3 Bro. 88 &c.

<sup>s</sup> 2 Vern. 365, 6. 1 Eq. ca. abr. 218, 9. 1 Bro. parl. ca. 591 &c. Prec. ch. 354. Lemon v. Lemon, 8 Vin. abr. 366. 1 Bro. 292. and n. on that fol. app. xiv. &c. 1 Bro. 492, 3. 3 Bro. 242. 347 &c. overruling, it seems, as to this point, the prior case *ibid* 255, 6.—The like favorable construction prevailed, where a leasehold estate, before the marriage, was settled upon the wife, in recompence and bar of dower, and for a provision for her, and the husband had no freehold estate; yet this was holden no bar to her claim of *thirds*. (3 Bro. 362.)

<sup>t</sup> Nor to dispose of for a valuable consideration.—To a bill for dower, it is no plea, that the defendant is a purchaser for a valuable consideration, without notice of the vendor being married. (3 Bro. 264, 5.)

from

from the claim of dower. Lastly, " where a testatrix, in pursuance, as she recited, of her power for that purpose, when in fact she had no such power, devised a copyhold estate to a person for life, who was intitled after her to the same in fee, and who was also appointed sole executor and thereby became intitled to the residue of the personal estate, the court determined, that he was not under any necessity of electing wholly to renounce benefit, or wholly to acquiesce, under the will. For where there is a defect of power in the devisor, and it cannot be certainly presumed, that, if he had been conscious of such defect, he would *then* have made a different disposition of the rest of his property, in such instances there seems no equitable ground for putting a party to his election of wholly renouncing benefit, or wholly acquiescing under a will. By the devise the property is legally vested, and can only be defeated or deranged on clear and unequivocal grounds of equity.

#### IV. Another question of the testamentary kind, which has often awaited the construc-

\* Cull v. Showell, appendix, case the first.

tive determination of a court of equity, relates to the clear residue or surplus of a testator's personal estate, whether it shall belong to the executor, or be distributed among the next of kin.

Where no particular legacy is bequeathed to the executor, he is intitled to retain the surplus. And here the rule is so unshaken, \* that parol evidence is said not to be admissible, to shew, that the testator, tho he gave

\* 2 Bac. abr. 426, cites the case of lady Osborne, widow, against Villiers and others, as of Hilary Term, 6 G. II. All that appears in the register's book, as to the point reported, is as follows. The plaintiff was a specific devisee for life of a real estate, one of the coheirs and next of kin, and also executrix of her brother the testator, Walsingham; she filed her bill in chancery, amongst other things, for an account of the personal estate possessed by the defendant Villiers &c.: he did not appear at the hearing: the defendant Lord Viscount Montague, one of the coheirs and next of kin, submitted how far he was intitled to a share of the personal estate. There had been a motion 23d Jan. 1732-3 to examine witnesses *vivâ voce* at the hearing to prove a great number of letters, saving just exceptions; but this was on the part of the plaintiff. The decree, on the 17th Feb. following, which is said to be made on hearing the proofs read, amongst other things, declares, "that the personal estate of the testator belongs to the plaintiff as she is executrix." This account does not much corroborate the report in 2 Bac. abr. but is perhaps consistent with it, which besides in its manner contains internal marks of authenticity to shew, that, where an executor has no pecuniary legacy, parol proof is inadmissible as to the testator's intention, that he was not to have the residuary surplus. But if evidence be admissible on one side, it seems, it must be so on the other. (2 Bro. 527.)

no legacy to his executor did not intend he should have the surplus. For it is a vested right, by the *legal* operation of the will, not to be defeated by parol testimony. But it is generally otherwise, where he has a legacy, tho<sup>x</sup> of the specific kind. In<sup>y</sup> a leading case on this point, the testator gave particular legacies to his children and grand-children, and ten pounds apiece to his executors for their care. The surplus being above £.5000, the question was, whether it should be a trust for the children, or go to the executors, and it was decreed a trust for the children. For<sup>z</sup> otherwise the executors, in the language of the chancery reporters, would have *all and some*; and the legacy, to a particular amount, implies, that they shall have no more. The<sup>a</sup> observation, indeed, of an executor's having *all and some*, has, in argument at the bar, been urged to be inconclusive, because a testator, not knowing in what

<sup>x</sup> 1 Bro. 154, 5.—A legatee, desired to act as executor, cannot claim his legacy, without acting, or at least proving the will. (3 Bro. 95.)

<sup>y</sup> 1 Vern. 473. 1 Wms. 550. And if there be no next of kin, the executors, so having legacies, are trustees for the crown. (1 Bro. 201—205.)

<sup>z</sup> 2 Wms. 213.

<sup>a</sup> 1 Wms. 546. 2 Vez. 94.

circumstances

circumstances he might die, (and whether there would be enough to pay the legatees their whole bequests, executors and all, without any abatement) might intend that in all events his executor should have some benefit under his will, and might have that meaning only in giving the legacy. This <sup>b</sup> reasoning seems also countenanced by lord chancellor Hardwicke; tho he admitted it to be settled, that the legacy would exclude. But if <sup>c</sup> the legacy to the executor be not an absolute gift, but an exception out of another bequest, as the use of goods, to such executor for life, then there is no inconsistency in his leaving the residuary surplus of the other personal estate.

Where legacies <sup>d</sup> are left both to the next of kin and to the executors, the latter will intitle themselves to the surplus, if they can shew in evidence by the testator's declarations, that he

<sup>b</sup> 2 Vez. 97.

<sup>c</sup> 1 Wms. 116. n. 1. 550. n. 1. (4th ed.) 1 Bro. parl. ca. 307, 8. 2 Vez. 29.

<sup>d</sup> 2 Vern. 737. 2 Wms. 213. 1 Bro. parl. ca. 340 &c. 1 Will. 313, 4. The same consequence would perhaps result, if the evidence were clear, to exclude the next of kin, tho legacies were given to the executors *only*. (2 Atk. 68, 69: but indeed in that case the legacies to the executors were *unequal*; see post. 499, and 2 Vez. 162.)

intended it for them, and to exclude the next of kin. For ° parol proof is here admissible, being to *rebut an equity*, (as it is technically expressed ; that is to defeat the resulting trust which equity might imply in favor of the next of kin, considering the executor as a trustee in their behalf) and of course to substantiate the legally vested right ; not to contradict the written will. But <sup>f</sup> it seems, if no such proof can be adduced, and legacies be given both to the executors and next of kin, the surplus will be distributed according to the <sup>g</sup> statute. Such <sup>h</sup> was the determination, after maturely weighing the former precedents, in a case since often cited ; the lord chancellor argued, that where a testator gives his personal estate from his nearest relations, he should be expected to say so ; else why should it be presumed ? Upon the whole of that case, there being express legacies to the executors, and no disposition of the surplus, he decreed them to be trustees with respect to such surplus, which should go to the next of kin.

But <sup>i</sup> a legacy to one of two executors, in-

° 2 Wms. 213.

<sup>f</sup> 3 Wms. 43. 2 Vez. 162.

<sup>g</sup> 22 and 23 C. II. c. 10.

<sup>h</sup> 1 Wms. 544 &c.

<sup>i</sup> 2 Vez. 97.

stead of excluding both, excludes neither from the surplus, because it might be given as an intended preference; besides, if such legatee die, having survived the testator, it is transmissible to the legatee's representative, and not, like <sup>k</sup> the surplus, liable to the other executor's claim of survivorship as jointenant. So it is, if the <sup>l</sup> legacies to executors be *unequal*, tho <sup>m</sup> both of the specific kind.

Where <sup>n</sup> a *wife* has been left executrix, and taken benefit under the will, the nearness of that relation may make a circumstance in evidence, but will not of itself intitle her to the surplus as a rule of law. However, parol proof may be admitted to substantiate her claim, as of other executors. In the following instance, the evidence was not only strong, but decisive on her behalf; where <sup>o</sup> a testator made his wife executrix, and directed a devise to be inserted to her of the surplus, but the person, who drew the will, affirmed, it was

<sup>k</sup> 2 Bro. 220 &c. 3 Bro. 455 &c.

<sup>l</sup> 2 Atk. 68, 69. 1 Bro. 328 &c. <sup>m</sup> 2 Vez. 30.

<sup>n</sup> 2 Vern. 675 &c. seems *contra*: but Prec. ch. 182 &c. 1 Will. 313, 4. 1 Bro. 154, 5. acc.

<sup>o</sup> 2 Vern. 252. 1 Wms. 116. 2 Wms. 213.

unnecessary, as she would be intitled to such surplus of course as executrix; it was hereupon decreed to her, for it was unreasonable, that she should suffer by the obstinacy of the drawer of the will, and his refusal to obey instructions. It<sup>p</sup> appears also, that such potent, extraneous proof, as occurred in this instance will not in all cases be required to turn the scale in her favor. On the other hand, if<sup>r</sup> a wife, having a power of bequeathing her separate property, leave her *husband* sole executor, he shall be intitled to the residue, *without the aid of extrinsic testimony* to corroborate his claim, and it shall not be construed a resulting trust for the benefit of her next of kin. But the following decision rested chiefly *on the evidence*. A<sup>r</sup> testatrix left legacies to her brothers and sisters, and an express legacy also to her *brother* the duke of Rutland, whom she appointed sole executor, and the lord chancellor determined, that he should retain the surplus: here tho some stress was laid on his being the head of the family, and therefore that the case was stronger than in favor

<sup>p</sup> 1 Wils. 314: see 2 Vern. 649. 1 Bro. parl. ca. 308; tho that decree has indeed been referred to another principle. (2 Vez. 29. ant. 497.)

<sup>r</sup> 1 Atk. 467.

<sup>r</sup> 2 Wms. 212.

even of a wife executrix, yet the firmer ground seems to be the evidence of the testatrix's intentions, which was very explicit on behalf of the duke. On this occasion however the doctrine was recognized, that giving express legacies to the next of kin, even tho it be to all the next of kin, will not exclude them from coming in for the surplus, according to the statute of distribution; and that there was still much less reason for it, if the legacies to the next of kin were unequal.

' Where ' a testator begins a residuary clause and leaves it imperfect, or where there is a blank only for the name of a sole legatee, these are strong marks of a testator's intention of excluding the executors, by treating them as trustees, not intitled to the *beneficial* interest, and consequently reasons for admitting the next of kin. Therefore ' a residue bequeathed, and afterwards lapsed, was decreed to the next of kin, tho " the executors had no legacies.

Lastly, if there ' be any declaration in the will,

\* 2 Vez. 98. 496.    † Ambl. 769.    " 3 Bro. 28 &c.

† 2 Vern. 100. 2 Wms. 161. 2 Atk. 18. 2 Bro. 156, 7.  
634 &c.—But it seems a man may be a trustee to a special purpose,

will, that the executors are only such *in trust*, they will not be intitled to the surplus; because then it may be averred, for whom they are trustees.

If <sup>w</sup> a surplus *be* to be distributed amongst the next of kin, they must seek it in a court of equity. The spiritual courts cannot compel a distribution, because they cannot ~~inforce~~ the execution of a trust.

V. There are various occasions, on which <sup>2</sup> executors and devisees in trust may seek the aid and direction of a court of equity, respecting the general management and disposition of their testator's real and personal estate, (and in particular the discharge of questionable legacies, the appropriation of funds for that purpose, the care and tuition of orphan wards, and a suitable and proportionate allowance for

purpose, and in other respects an executor, without prejudice to his general right in the latter capacity. (2 Bro. 31.)

<sup>w</sup> 1 Wms. 549.

<sup>x</sup> An appointment in a will of certain persons to receive and pay the contents before mentioned has been holden by the ecclesiastical court a sufficient nomination of them to the office of executors. (Ambl. 364.)

their

their maintenance to be paid to their guardians) and may providently desire to act under the indemnity of the court of chancery.—As to the execution of trust limitations of real estates, and that which is analogous to them in personal effects, I have already mentioned some rules and constructions, which seemed primarily to challenge observation. As to *mere* personal effects and property, disposed of in a way *not analogous* to interests in land, but absolutely to the legatee named, the precedents, from their nature, can rarely be of extensive application, or become principles of construction and decision in other cases, not exactly similar. Yet some there are, which may serve to solve occurrences perfectly parallel, and not unlikely to recur. Of this kind are the resolutions, that <sup>1</sup> by a bequest of “household goods” plate shall pass; that <sup>2</sup> under the term “jewels,” such as were annexed to a peer’s robes, and his ensigns of honor as a knight of the garter, should not be included; that <sup>3</sup> pictures, bought after making the will, may pass thereby, where it is the intention to give a formed collection;

<sup>1</sup> 2 Vern. 638.<sup>2</sup> Ow. 124.<sup>3</sup> Ambl. 641.

that <sup>b</sup> a devise of "all one's goods" passes a bond; and <sup>c</sup> that a testamentary gift of "furniture" may convey plate and pictures, but not a library of books, to the legatee.

If a creditor <sup>d</sup> make his debtor his executor, the *legal* consequence is, that the debt is totally extinguished, and cannot be revived: but if a debtor be appointed administrator, that is no extinguishment of the debt, but a *suspension* only of recovering it by action; and his representative on his death would be chargeable at the suit of the administrator *de bonis non* of the first intestate; the power of administrators, as such, arising from the ordinary, and the rights and interest of executors being derived from their respective testators. When however it is said, that if a creditor make his debtor his executor, the debt is extinguished this must be understood, as the matter stands *at law* merely, and without the aid of a court of equity. For <sup>e</sup> if an executor be indebted to his testator, he must account for such debt in equity to the residuary legatee, or <sup>f</sup> next of

<sup>b</sup> 1 Wms. 267.

<sup>c</sup> Ambl. 605 &c. 3 Atk. 202.

<sup>d</sup> 1 Atk. 461.

<sup>e</sup> 1 Ch. ca. 292. C. T. T. 240.

<sup>f</sup> 3 Bro. 110, 1.

kin, as the case may be. And if<sup>z</sup> such debt due from an executor be secured by mortgage, it is improper for the co-executors to bring a bill of foreclosure; but if they be apprehensive of his insolvency, they may bring a bill for sale of the incumbered estate.

If<sup>h</sup> an executor pay simple contract debts due from his testator, preferably to a bond, of which he has<sup>i</sup> notice, he is liable to satisfy the latter *de bonis propriis* in equity as well as at law. But<sup>k</sup> an executor is not compellable either in law or equity to take advantage of the<sup>l</sup> statute of limitations against a demand otherwise well founded, in order to cover his testator's effects.

It seems, <sup>m</sup> an executor or administrator will be allowed out of the *real assets* the

<sup>z</sup> 2 Atk. 56.

<sup>h</sup> 1 Atk. 468.

<sup>i</sup> It is said, (2 And. 159. cited 4 Burn. eccl. law 253. ed. 1767.) that an executor is not bound to take notice of judgments against the testator in his life. But the contrary is adjudged. 1 Cro. 793. It is, however, generally in the election of the executor to pay which bond creditor, or which judgment creditor, he pleases, out of the personal assets, not preferring one *class* of creditors to a superior class. Vol. II. 417. Went. off. exec. 142. 136. (ed 1728.) Swinb. 456. 458. (ed. 1743.)

<sup>k</sup> 1 Atk. 526.

<sup>l</sup> 21 J. I. c. 16. Ant. 160.

<sup>m</sup> 3 Wms. 398.

whole money, which he has disbursed in the payment of *judgment* creditors, for so far he has duly administered. But if he go farther and pay *bonds* beyond the extent of the *personal assets*, he must be content to charge *the real assets* rateably only with the other bond creditors.

Farther, <sup>a</sup> if a creditor bring a bill, and obtain a final decree, and a report of the master, and that report be confirmed, and then another creditor bring a bill, and obtain a final decree, and his demand be confirmed, the executor ought to pay him first, who used the first diligence; as in <sup>o</sup> actions at law, the judgment creditor, who first sues out execution, shall be preferred: but there is no priority in paying legacies. And when new creditors come in under a bill filed by others, which is usual, and their demands are included in the same general report, they must all, it seems, be paid according to *legal* priority: that is out of *legal assets*.

If an <sup>p</sup> executor, tho without proving the

<sup>a</sup> 3 Atk. 209.

<sup>p</sup> Ambl. 417.

<sup>o</sup> Wentw. off. ex. 136. (ed. 1728.)

will, administer the effects, then renounce the executorship, and pay over the assets possessed by him to the other executor, still he remains accountable for his receipts to the residuary legatees. An executor may also be liable for his omissions, as if he <sup>a</sup> neglect to bring an action on a bond; or if he <sup>r</sup> keep money dead in his hands: but if he had laid it out in the government funds, called *three per cents*, the court would have affirmed his act.

Lastly, if <sup>s</sup> an executor *admit assets*, there will be a personal decree against him, to answer the demands of creditors and legatees, unless he can shew, that such admission was built on circumstances, which have since failed, as the insolvency of a banker of credit, in whose hands money was deposited, being part of the testator's personal estate.

Such are some of <sup>t</sup> the privileges and obli-

<sup>a</sup> 2 Bro. 156, 7.

<sup>r</sup> 3 Bro. 73, 74 433, 4.

<sup>s</sup> 2 Vez. 85.—Such admission of assets is waived by going to an account, instead of taking a personal decree. (1 Bro. 489.)

<sup>t</sup> See farther, 3 Wms. 249 &c: and some late cases, how executors may be intitled or become liable to costs, viz. 3 Bro. 90. 2 Bro. 156, 7. 3 Bro. 73, 74. and as to bankrupt and infant executors, 2 Bro. 396, 7. 3 Bro. 195, 6. 198, 9.

gations of executors, as considered by courts of equity, when appearing before them in these testamentary causes. In the next and concluding lecture I shall consider testamentary causes in equity as confined simply to legacies.

## LECTURE LX.

*Of suits in equity concerning legacies.*

IN the last lecture I treated of divers matters of construction and decision, occurring in testamentary causes in courts of equity. I shall now speak more particularly of the various discussions, which *legacies* may give occasion to in those jurisdictions: first, describing their *general nature and species*; secondly, considering some obvious points of *uncertainty*; thirdly, attending to the question, whether legacies shall be taken *singly, or by way of accumulation*; fourthly, *when, and what, interest shall be paid for them*; fifthly, *when they shall merge in the land, on which they are charged*; sixthly, mentioning cases of *abatement*; and seventhly and lastly, treating of the doctrine of *ademption*.

I. A legacy is defined by Swinburne<sup>a</sup>, to

<sup>a</sup> P. i. § 6.

be

Black - defines  
legacy to be a  
quest of gift  
goods & chattels  
testament

ib. 11 p 512

be "a gift left by the deceased to be paid or performed by the executor or administrator."

By calling it "a gift" it is shewn to arise from the mere liberality and bounty of the testator, and not from matter of necessity. Therefore if a man covenant to leave any person a certain sum of money by his will, the money so left seems not to be properly a legacy. By the mention of an "administrator" in the definition, it is inferred, that if no executor be named in the will, or if the person named renounce the executorship, or die before he has fully administered the goods and chattels, rights and credits of his testator, so that the appointment of an administrator *de bonis non* becomes necessary, still in these cases also the legacy is to be paid or performed.

1. Any words, which shew the testator's intention of bequeathing, are sufficient to constitute a legacy, and to impose this obligation of payment or performance on the executor or administrator. Thus if <sup>b</sup> a testator *desire* his executor to give another £.200, without prescribing any time of payment,

<sup>b</sup> 1 Ch. rep. 246, 7.

it is a good bequest, and payable like other legacies. For where the<sup>c</sup> property and the person are ascertained, *recommendatory* bequests are considered as *imperative*.

2. A second discrimination of legacies divides them into *specific*, (as of a cabinet of curiosities, or any other chattel, animate or inanimate) and *pecuniary*, of a definite sum of money; which latter are said to consist in quantity, and are to be satisfied out of the general unappropriated assets. This distinction must be resumed in treating both of abatement and of ademption.

3. A third and very important division of legacies is into, *vested*, and *contingent*. Conditional bequests, in restraint of marriage, have been before<sup>d</sup> considered. So legacies may be left on other contingencies. But the common use of the distinction is, where bequests

<sup>c</sup> 2 Bro. 45, 46. 230, 1.—This seems the first and most obvious division of bequests. Ayliffe (par. jur. can. Angl. 335, 6.) distinguishes between universal or particular, and simple or conditional legacies. He also (ibid. 342.) speaks of alternative bequests; in which case, he tells us, the legatary has his election. See Dom. civ. l. b. iv. t. 2. § 7.9.

<sup>d</sup> Vol. I. 428 &c.

refer to a time future, before<sup>e</sup> which period the legatee dies: if vested, they *survive* to his personal representative; if contingent, they *lapse*. And the general<sup>f</sup> rule is, that if the time of payment merely be postponed, and it appear to be the intention of the testator, that his bounty should immediately attach, the legacy is of the vested kind; but if the time be annexed to the substance of the gift, as a condition precedent, it is contingent, and not transmissible. As a farther criterion the<sup>g</sup> giving interest is sufficient to constitute the legacy vested: but the<sup>h</sup> ordering of maintenance is not equivalent thereto. And there seems this<sup>i</sup> difference established as to those

\* An absolute legacy also is liable to lapse, if the legatee die before the testator, as in the case of a devise of lands. (Vol. II. 350, 1.) Even if the legatee be dead at the time of making the will, and the gift run to him, his executors, administrators, or assigns, parol proof is not admissible, that the testator knew of the legatee's death, as an argument, that he meant, it should be transmitted to his personal representative. (1 Bro. 84, 85.) But a will may *expressly* provide for the event of a legatee's dying in the life of the testator, and may substitute another taker in the room of such original legatee. (3 Bro. 224 &c. 240 &c.)

<sup>f</sup> 2 Sal. 415. 3 Bro. 473. See 2 Black. comm. 513. 2 Bro. 77. 3 Bro. 5 &c. 25 &c. 2 Vez. 263. Str. 238, 9.

<sup>g</sup> 1 Bro. 105. And in such case it may be proved under a commission of bankruptcy against the executor. (2 Bro. 306.)

<sup>h</sup> 3 Bro. 419. Str. 239.

<sup>i</sup> Ambl. 588. 1 Bro. 105. 1 Vez. 307.

who

who claim in substitution of the primary intention of the testator: that if a conditional legacy, on failure of the contingency, be limited over to another, the title of such person immediately accrues: but if a legacy be payable at the age of majority, without such limitation over, and the legatee die before that age, his representative stands only in the same situation, and cannot insist on payment, till the infant would have arrived at that time of life; unless indeed interest (perhaps the whole interest) is given in the mean while.

4. By <sup>k</sup> defining a legacy to be a "gift left," it is distinguished from a *donation causâ mortis*, which must be delivered by the donor in his life time, and is described in the<sup>l</sup> imperial institutes, "*cum quis ita donat, ut si quid humanitus ei contigisset, haberet is, qui accepit, sin autem supervixisset is, qui donavit, reciperet, vel si eum donationis pœnituisset, aut prior decesserit is, cui donatum sit.*" With us it hath been<sup>m</sup> holden, that a *donation causâ mortis* is not good, unless made by a party in his last sickness; that, altho it is in nature of a legacy, it need not be proved

<sup>k</sup> Swinb. p.i. § 6.

<sup>l</sup> L. ii. t. 7. See 2 Vez. 439, 440.

<sup>m</sup> 1 Wms. 441 &c. &c. 2 Bro. 612, 3.

3 Wms. 357, 8. See 2 Vez. 439

in the spiritual court, as part of the testator's will, for it operates as a declaration of trust upon the executor; that it may be effectual from a husband to a wife; and that, as it is an essential requisite, that the subject of a *donation causâ mortis* should be<sup>n</sup> actually delivered by the party in his life time, therefore a<sup>o</sup> chose in action, (as a promissory note, not payable to the bearer) the property wherein does not pass by delivery, cannot be so disposed of. Hence it has been<sup>p</sup> solemnly determined, that money in the public funds is not claimable by this kind of legatary gift, accompanied with delivery of receipts for such stock. Such<sup>q</sup> donations are subject to the debts of the deceased, like his other property.

II. As to obvious points of *uncertainty*, such I mean as are likely to recur, these either respect the person, or the interest bequeathed.

<sup>n</sup> 2 Vez. 441, 2. 3 Wms. 358.

<sup>o</sup> 3 Wms. 358: but see 1 Wms. 443. 2 Vez. 442: in which last book it rather seems, that a bond may pass in this manner: as to Jenk. 109, there cited, see vol. II. 410.

<sup>p</sup> 2 Vez. 431—444; where the subject is largely treated of and illustrated.

<sup>q</sup> 1 Wms. 406.

1. In respect to the person, it <sup>1</sup> has been decided, that under the description of children or descendants, an infant in *ventre sa mere*, unborn at the time of the testator's death, or at the time specified for making division, as the case may be, cannot take. It is also established, that if the testator <sup>2</sup> use the general phrase of persons related to him, the statute of distributions must be the guide of construction; that "<sup>3</sup> descendants" includes grandchildren; that "<sup>4</sup> under the last expression a great-grandchild may be intitled; and that if a <sup>5</sup> legacy be to the two daughters of A, who has three daughters, they will all take. A <sup>6</sup> mistake in the name of the legatee may be rectified; but <sup>7</sup> if a mere blank be left after a title of dignity, or the like, it will not be permitted to shew, who was meant.

2. As to the interest bequeathed, if a <sup>8</sup> testator miscalculate a residue, or a debt so disposed of, the real residue, or debt, will pass.—

<sup>1</sup> 1 Vez. 111 &c. <sup>2</sup> Bro. 47: 63. <sup>3</sup> Bro. 419.

<sup>4</sup> Ambl. 397. <sup>5</sup> 1 Bro. 31 &c. <sup>6</sup> 3 Bro. 234, 5. It seems the term "relations" shuts out the wife. (1 Bro. 33.)

<sup>7</sup> 3 Bro. 370.

<sup>8</sup> Ambl. 604.

<sup>9</sup> 2 Bro. 86.

<sup>10</sup> 1 Wms. 425. Ambl. 374. <sup>11</sup> 1 Bro. 31.

<sup>12</sup> 3 Bro. 311 &c.

<sup>13</sup> 2 Bro. 18 &c. 87.

The intention is to be explored, and to govern the decision. In these cases, as I have before <sup>b</sup> observed, precedents, not closely in point, must be of little avail.

III. I now advert to our third proposed inquiry, *where legacies shall be construed accumulatively*. This is in other words exploring the intention of the testator, whether he meant that one bequest should be in satisfaction of another, or should stand together with it as an additional bounty. Such <sup>c</sup> intention, when discovered, must govern, whether *duplicare legatum, an repetere*. If the <sup>d</sup> same specific chattel be repeatedly bequeathed, such bequest can take place but once: *at eadem QUANTITAS minus præstari potest*. If the <sup>e</sup> same legacy of quantity be simply repeated in the same will, it seems due but once: but if <sup>f</sup> the second bequest be in a codicil

<sup>b</sup> Ant. 503.

<sup>c</sup> Dig. l. xxii. t. 3. le. 12.

<sup>d</sup> 1 Bro. 391. n.

<sup>e</sup> 1 Bro. 30. & n; tho this difference between the legacies being in the same will, and being one in the will, the other in a codicil, is mentioned as a strange distinction in Mr. J. Aston's learned argument, 1 Bro. 391. n. but he seems afterwards to admit it as settled.

<sup>f</sup> Dig. l. xxii. t. 3. le. 12. 1 Bro. 389 & c. Tho the legacies be in different instruments, yet if they be not given simply, but

dicil of a date posterior to the will, it is construed, *primâ facie*, a duplication. So if <sup>s</sup> the sums in the will and codicil be unequal, whether the latter be the greater or the smaller of the two, they shall be taken accumulatively. In a case of which kind it was considered <sup>h</sup> as a circumstance tending to prove, that the testatrix intended additional bounties, inasmuch as she, after the making of the will, and before the date of the codicil, had an increase of fortune. In like manner <sup>i</sup> where the testator devised £.300 to be paid to the child, which he should have at his death, and if he should have none, then to his sister, and afterwards, having three chil-

but for a reason expressed, which reason is the same in the will and in the codicils, it denotes the intention of giving but one bequest, and such intention must prevail. (2 Atk. 640. 1 Bro. 392. n.) On the other hand, if the wording of the gift in the codicil be varied from that in the will, and mark the legatee as an object of the testator's peculiar favor, this corroborates the *primâ facie* presumption of law, that the latter should be an additional legacy. (1 Bro. 393.) And the like seems to hold, where there is but one instrument. (2 Bro. 225, 6. 528.)

<sup>g</sup> 1 Wms. 423, 4. 1 Bro. 390 &c. n.

<sup>h</sup> 1 Wms. 424.—This extrinsic evidence of intention might be taken into the account, consistently with a recent decision; that the ambiguity of presumption, whether a legatee shall have two legacies, does not arise simply from the construction of words; but is a presumption *donec probetur in contrarium*; and so lets in all sorts of evidence. (2 Bro. 526, 7.)

<sup>i</sup> 1 Ch. ca. 301.

dren born, he bequeathed by a codicil £.200 to each of them, to be paid at their respective ages of twenty-one years, this is not void for uncertainty; and the latter devise being without words signifying the same to be of their portions, or any thing either to revoke or affirm the former gift, it shall be taken by way of accumulation, and the children shall equally divide both legacies. But where<sup>k</sup> a testator having made a codicil containing several legacies, afterwards made a second precisely to the same effect with the addition of only one pecuniary legacy, his intention was thought to appear, that there should be but one codicil, and the latter only was decreed to stand.—On these occasions, (besides weighing the evidence, internal and external, of the testator's intention, which must prevail, when it can be discovered) the court of chancery has<sup>l</sup> very unreservedly referred to the rules of the Roman civil law, as principles of decision.

Of close affinity to these cases, of double

<sup>k</sup> 2 Bro. 521—529.

<sup>l</sup> 2 Atk. 638 &c. 1 Bro. 391, 2. n. 393.

claims,

claims, both such double claims being testamentary, are questions of *satisfaction*, viz. whether a bequest shall go in lieu of a portion secured by a settlement, or stand together with it as an accumulation. Thus<sup>m</sup> if a testator bequeath to his sisters a greater sum than was secured and charged on the land by the family settlement, and then devise the estate to his heir male, this shall not be in lieu of the portions due by such settlement. Cases of this kind are sometimes considered and ranked under the title of *ademption*.

IV. I proceed, fourthly, to enquire, *when, and what, interest shall be paid for legacies*. If a<sup>n</sup> legacy be charged on land, and no time of payment be mentioned in the will, it shall carry interest from the testator's death; because the land yields rents and profits from that time. If a legacy be given out of a personal estate,

<sup>m</sup> 2 Vern. 177. 258. See 2 Bro. 352—376: where most of the cases relating to *satisfaction*, and which depend on the testator's intention, are cited: see also *ibid.* 394 &c. 529 &c. A portion given to a daughter is generally a satisfaction of the legacy to the same amount in the Father's will. (3 Bro. 61 &c. See 3 Bro. 192 &c.)

<sup>n</sup> Sal. 415. 1 Vez. 310.

consisting of mortgages carrying interest, or of stocks yielding profits half-yearly, the same rule seems to obtain. But if a legacy be to come generally out of the personal estate, and no time of payment mentioned, it shall carry interest only from the end of the year after the death of the testator. That time is allowed to an executor for making distribution by the ° statute for that purpose; which strengthens the rule; but it is said<sup>p</sup> to have obtained before in the court of chancery, which derived it from the ecclesiastical jurisdiction. So if<sup>r</sup> a legacy be charged upon what is called *a dry reversion*, it shall only carry interest from the last mentioned period, a year being a convenient time for a sale. If a<sup>r</sup> day be limited for the payment of a legacy, interest accrues from that day. Where<sup>s</sup> a sum of money is bequeathed to *a child*, payable at a particular time, and no provision is made for the maintenance of such legatee, a court of equity will decree interest, or a suitable allowance. For<sup>t</sup> as the legacy would

° 22 & 23 C. II. c. 10. § 8.

<sup>p</sup> 1 Vez. 310.

<sup>r</sup> 2 Wms. 26, 27.

<sup>r</sup> Sal. 415, 6. 1 Vern. 262.

<sup>s</sup> 2 Vent. 346. 2 Bro. 59.

<sup>t</sup> 1 Ch. ca. 60. See 1 Vez. 307.

go to the executors of the legatee in case of his death, *a fortiori* it shall contribute to his support, while he lives. Here it is implied, as to \* what is said of going to the executors, that this instance must be understood of a legacy not liable to lapse, in case of the legatee's death. But by \* more recent authorities it seems, that, if even a *contingent* legacy be given to *a child*, who has no other provision, the court will give interest by way of maintenance; for they will not presume the father inofficious, or so unnatural, as to leave a child destitute. This rule however is not extended to legatees, who are \* *grandchildren* of the testator, to intitle them to interest, or to have the principal secured, where it is given over on the contingency expressed; neither does it include \* *illegitimate children*.

There are also other instances, besides what I have already mentioned, of interest being due on legacies from the time of the testator's decease: as, \* wherever the court decrees a le-

\* Sal. 415.

\* 3 Atk. 102. 2 Bro. 58, 59.

\* 1 Vez. 211. 1 Atk. 505. 2 Atk. 330. 3 Atk. 101 &amp;c.

—But a *vested* legacy, payable in future, will be ordered to be secured. (Ambl. 273.)

\* 1 Vez. 310,

\* 3 Atk. 99.

gacy to be in satisfaction of a debt owing from the testator to the legatee, (which matter is generally referred to the head of ademption) and <sup>b</sup> wherever the legacy is of a specific kind and yielding interest, (as money in the funds, described as then belonging to the testator, and bonds for the most part, are) it shall carry interest, at <sup>c</sup> least, from the last mentioned period. The same benefit <sup>d</sup> was decreed to a legatee, who was niece to the testator, from the particular facts of the case: for it appeared, that a smaller legacy, at first bequeathed to her, was payable at an age, which she attained in the testator's life time; and there was an indication of separating the legacy in question from the bulk of his estate. We see therefore, that, on various grounds, interest has been deemed payable from the testator's death.

<sup>b</sup> 2 Vez. 563. See 3 Bro. 419.

<sup>c</sup> To be more exact, it seems, a common bond, so bequeathed, passes all the arrears of interest; and money in the funds, the dividends, from the day of payment thereof, next antecedent to the death of the testator.

<sup>d</sup> 1 Wms. 783. 1 Vez. 310.

It happened in one case, that <sup>a</sup> a husband, apprehending a legacy due to his wife was payable only at her marriage, received the principal and interest from that time; but after seven years acquiescence, discovering, that the legacy was really payable at the expiration of a year from the testator's death, he filed his bill in chancery, and recovered the arrears of interest from such earlier period.

Some <sup>f</sup> books intimate the necessity of a demand of payment, where the bequest is payable at a certain time, and the legatee is of full age, in order to intitle him to interest subsequent to such demand; but if this idea ever prevailed, it seems wholly obsolete.

If <sup>g</sup> legacies be left to be divided according to the discretion of an executor, and he neglect to make distribution beyond a year, he must from that time be accountable for interest.

<sup>a</sup> 3 Wms. 126.

<sup>f</sup> Prec. ch. 161. 1 Eq. ca. abr. 286. Poph. 104.

<sup>g</sup> 2 Vern. 745. 1 Vez. 211.

As to the <sup>b</sup> rate of interest, where portions were charged on land, and the wills did not mention interest, the court refused to give more than four per cent, tho the legal interest is five per cent; and the rule has been since extended to cases, where legacies and portions are charged upon personal estates, and is now <sup>i</sup> become the established practice.

I must further observe on this head, that <sup>b</sup> tho pecuniary legacies, not having the addition of the word sterling, are to be paid according to the currency of the country, where the will was made, yet interest thereon is to be computed according to the course of the court at four per cent, and not according to the rate of interest in such country.

V. I am, fifthly, to inquire, *when legacies*

<sup>b</sup> 2 Atk. 343. 523. 1 Vez. 171. 277, 8. 311. 2 Vez. 240.

<sup>i</sup> Tho between the above cited authorities and the present time, there are several intermediate cases, which seem to preserve the distinction of four per cent. for legacies charged on land, and five for those to be answered by the personal effects. (1 Vez. 171. 277, 8. 311. 2 Vez. 240.) But the distinction is at an end.

<sup>b</sup> 2 Bro. 47. 3 Bro. 53, 54.

*charged*

*charged on real estate shall merge in the land.* Here the general rule is, that <sup>1</sup> where a legacy or portion is charged on, or devised out of, a real estate, and the legatee dies before the time appointed for payment, the legacy shall sink into the land, and equity will not load an heir for the benefit of an executor or administrator. The same privilege is extended to a *haeres factus*, or devisee of the real estate, who is also exonerated in this respect, like the heir by descent. In one of the earliest cases on this subject, <sup>m</sup> a portion was charged on a term for years, created out of an inheritance for that purpose, payable to a daughter at the age of twenty-one years or marriage; the daughter died before that age unmarried, and her administratrix suing in equity for this portion, the court decreed, it should sink into the land. In which case the portion was given both by settlement and will. And if a portion depending on a marriage settlement ought to merge, *a fortiori* ought a legatary portion given merely by a will, and which is the bounty of the testator. So <sup>n</sup> where *money*

<sup>1</sup> 2 Ven. 366, 7. 2 Wms. 277. 610. 612. n. 1. (4 ed) where there are very numerous references to cases on this subject.

<sup>m</sup> 1 Vern. 204. 321.

<sup>n</sup> 3 Atk. 112. 3 Bro. 108 &c.

is to be laid out in land to be settled, and a bequest charged upon it, such legacy shall sink for the benefit of the heir: for money to be laid out in land must be considered as a *real* fund. And<sup>o</sup> there seems to be no distinction as to this point, whether the legatee is a child, or a stranger. Yet<sup>p</sup> the distinction must generally seem hard, that such a legacy as would be deemed vested, and, if payable out of the personal estate, would be transmissible to representatives, should, when charged on land, merge in favor of the heir. Nevertheless it<sup>q</sup> is laid down, that if a legacy be charged on a *mixed* fund of real and personal estate, and the legatee die before the time of payment, no part shall be raised out

<sup>o</sup> 2 Wms. 613.

<sup>p</sup> 2 Atk. 128.—I have not found the reason of this important distinction clearly explained. In 1 Atk. 486, the idea of its being in favor of the heir is discountenanced: and this solution is given; that in case of personal estate, the rule is the same in chancery as in the civil law, to preserve uniformity of judgments; but in the case of lands, the court will govern itself, so far as is consistent with equity, by the common law; by which law, if a person covenant to pay money to another at a future day, and the covenantee die before such day, the money is not due to his representative.—But surely the law not only is, but immemorially hath been otherwise; *viz.* that executors or administrators shall have a writ of covenant for a personal thing. (F. N. B. 145. D. 146. D. Covenant by executors of the master of an apprentice. Reg. 165. b.)

<sup>q</sup> 1 Atk. 485. 3 Atk. 115. 320.

of

of the real effects, as auxiliary to the personal. But<sup>s</sup> tho the representative cannot resort to the land, where the legacy is charged on a mixed fund, he may get the whole, or part of it, out of the personal effects. Thus<sup>s</sup> where a father devised a considerable sum to his son, payable at the age of twenty-four years, and a certain maintenance in the mean time, this being given first and principally out of the personal estate, and not a direct legacy out of the real estate, which was only charged in aid of the personal, it was holden not to be frustrated by the death of the party before the time of payment. It is generally true also, that<sup>u</sup>

<sup>s</sup> Whether the real effects shall satisfy legacies, in aid of the personal, that being primarily charged and proving deficient, is a question of the testator's intention, usually depending on the rational construction of the whole will. (3 Bro. 627 &c.)

<sup>s</sup> 2 Wms. 611.—It may be of occasional use to observe, (tho not strictly falling under the present head of disquisition) that if a legacy be to come at a future time out of a particular fund, as the profits of a farming business, which fails by the landlord's refusal to renew, the bequest is not demandable out of the general assets. (2 Bro. 125. See 1 Wms. 778, 9.)

<sup>s</sup> Str. 238, 9.—This case, I believe, rightly understood, proves nothing more than the common doctrine of the court. For the maintenance, and not interest, is directed, yet the legacies are stated to be *payable at &c*; and therefore *quoad* the personalty were vested: and it is plain, the personalty was adequate, for they were sued for in the spiritual court; which could not decree execution of a trust of lands; the suit in chancery being to restrain the ecclesiastical judge. I have quoted the case for the sake of this exposition.

<sup>s</sup> Prec. ch. 348 &c. 2 Atk. 129.

§

where

where a legacy depends on two contingencies, and one of them doth not happen, the legacy shall be raised. In another case \* before quoted, the testator bequeathed to his daughter, at her age of twenty-one years or day of marriage, which should first happen, £.2500, and if his son should die without issue male of his body then living, or which might afterwards be born, then the daughter should have, at either of the times aforesaid, which should first happen, the farther sum of £.3500, but in case the contingency of the son's dying should not happen before the daughter's said age or day of marriage, then she should receive the last mentioned sum, whenever it might after happen: which sum was charged on the devised lands. The daughter married, having attained her age of twenty-one years, and died in her brother's life-time; her husband took out administration to her, and then, the brother dying without issue male, sued in equity for this legacy of £.3500; and the question was, whether, the personal estate being deficient, such legacy should be raised out of the land. The court decreed, that

\* C. T. T. 117 &c. 3 Wms. 414 &c. 3 Atk. 321.  
Vol. II. 247, 8.

the legacy should be so raised, and reasoned, that the case was different from those, where the cause of giving the legatary portion, namely the advancement of the child, ceases; for here the legatee *had* married, and this legacy, tho future and contingent, might be a consideration in that engagement, and in the terms of it. Another ground of the determination was, that the time of payment of the legacy was postponed for the conveniency of the estate. This latter principle was adopted, and governed the decision in a <sup>x</sup> subsequent case, in which it clearly appeared, that postponing the time of payment had relation to circumstances of conveniency to the estate, and did not respect the person of the legatee.

VI. I proceed now to the sixth subject of inquiry, namely, *when legacies shall abate*. Here we must resume the distinction between a *specific* legacy, as of a piece of plate, or the like, and a *general* legacy of a sum of money, which latter *consists in quantity*. Pecuniary

<sup>x</sup> 3 Atk. 319 &c. See 2 Atk. 127.

legatees abate in proportion, if there be a deficiency of assets, but not specific legatees. It has been<sup>r</sup> observed, that as there is a benefit one way to a specific legatee, (viz. by not abating) so there is a hazard the other way; for if such specific legacy, being a lease, be evicted, or, being goods, be lost or burnt, or, being a debt, become irrecoverable by the insolvency of the debtor, in all these cases such specific legatee shall have no contribution from the other legatees, and therefore shall pay no contribution towards them. As<sup>2</sup> to pecuniary legacies, if they be actually paid, and no provision be made for refunding, yet the common justice of the court will compel a legatee to refund in favor of a creditor, or even of another legatee, where there is a deficiency of assets.

Where<sup>3</sup> the sum of £.1500 was left to be laid out in land, and to be subject to a rent-charge, and it was insisted, that this formed it into a specific bequest, the lord chancellor determined otherwise; he agreed, that the legacy was to be taken as land; but what the legacy was, or how much was to be laid out

<sup>r</sup> 1 Wms. 540.<sup>2</sup> 1 Vern. 94.<sup>3</sup> 1 Wms. 539 &c.

in land, was the question; and he asked, if £.1500 of the testator's <sup>b</sup> money lay upon the table, whether the legatee could say, "I have a right to this very money *in specie*;" if not, said he, then it is no specific legacy. In another case it was the interest of the legatee to contend, that what he claimed was a general pecuniary bequest. This <sup>c</sup> arose on a legacy of £.400 East India bonds, one of which only was found at the death of the testatrix. The master of the rolls held this, as the case stood, to be a legacy of quantity, and to be supplied out of the residue. For legacies <sup>d</sup> of stock or annuities in the public funds may, according to the circumstances, be considered either as specific, or general and consisting only in quantity. Here also, as in solving most other testamentary points, it is

<sup>b</sup> A legacy of *a sum of money* may be specific, being described as contained in such a bag, or the like. (1 Atk. 508.) Also if a man bequeath so much stock in the public funds, which he at that time is not possessed of, it is a direction to the executor to procure so much stock for the legatee; and it seems to be of the nature of pecuniary legacies. (C. T. T. 227.) It appears farther, that a personal annuity left by a will is to be considered as a pecuniary legacy. (3 Atk. 693, 4. 2 Vez. 417.) But where an annuity and legacy were bequeathed to a wife in bar of dower, it was decreed, that even the latter should not <sup>abate</sup> in proportion with the other legatees. (Ambl. 244, 5.)

<sup>c</sup> 2 Vez. 562, 3.

<sup>d</sup> 1 Vez. 425. See 3 Bro. 160, 1.

material to investigate the intention of the testator, viz. whether ' he meant to confine it to the stock, (as by calling it *his* stock) which he had at the time of making his will.

A <sup>a</sup> specific devisee of lands shall never contribute upon an average with the heir at law towards satisfaction of creditors, while the real assets *of the heir*, that is, those descended, are sufficient. In <sup>b</sup> conformity to which rule, it has been holden as to personal estate, that there ought not to be a proportionable deduction between specific and pecuniary legacies, but that the latter ought first to be applied towards payment of debts. But <sup>c</sup> specific legacies shall be applied in payment of simple contract debts, (tho not of other legacies) in case of the real estate. I shall add, that <sup>d</sup> appointing a legacy to be paid at an earlier time will give no preference to that legatee; but if there be a deficiency of as-

<sup>a</sup> 2 Bro. 111, 2.

<sup>b</sup> 1 Atk. 505.

<sup>c</sup> Bunb. 32, 33.

Bunb. 90. 2 Wms. 382, 3.—But as to debts by specialty, specific devises of freehold and leasehold estates seem to be on the same footing, since the statute of fraudulent devises, 3 W. & M. c. 14, and liable to contribute in equal proportions to the satisfaction of those debts. (1 Wms. 403, 4.)

3 Atk. 100.

setts, he must also abate *pro ratâ*: and that  
 'charitable bequests must abate in proportion  
 with the rest; tho the Romans gave a pre-  
 ference to pious or charitable legacies.  
 Lastly, if <sup>m</sup> an executor have a legacy given  
 him for his care and pains, he must abate in  
 proportion with the other legatees.

VII. I shall seventhly and lastly inquire  
 into the *ademption of legacies*; which may be  
 described as being of two sorts, one arising  
 from the destruction or alienation of the thing  
 bequeathed, the other happening where the  
 testator is a debtor of the legatee.

1. In all testamentary matters of a personal  
 nature, our courts have availed themselves of  
 the juridical wisdom and experience of the  
 civilians. If we consult them as to the for-  
 mer species of ademption, we shall learn,  
 "*si<sup>a</sup> domu destructâ, aliam eodem loco testator  
 ædificaverit, dicemus interire legatum, nisi aliud  
 testatorem sensisse fuerit adprobatum.*" Here  
 the testator may perhaps have been inactive

<sup>1</sup> 1 Wms. 675. <sup>2</sup> Vez. 563.

<sup>a</sup> 2 Atk. 171.

<sup>a</sup> Dig. l. xxx. le. 65. § 2.

and passive as to the supposed destruction of the thing bequeathed. If he alien or give it away in his life-time, there seems stronger reason for saying the legacy is adeemed. “*Rem<sup>o</sup> legatam si testator vivus alii donaverit, omnimodo extinguitur legatum.*” “*Cum<sup>p</sup> servus legatus a testatore et alienatus rursus redemptus sit a testatore, non debetur legatario.*” “*Legatum speciei* (says an able<sup>a</sup> civilian) *extinguitur dissolutione, licet ipsa species retineatur.*” To confirm his opinion he cites a law in the <sup>1</sup> digests, where the change of ornaments works an ademption; and then proceeds, “*difficilius enim extinguitur legatum in genere consistens, quam speciei; speciei extinguitur alienatione, quicquid ex ejus pretio faciat testator.*”

But both the <sup>1</sup> text and commentators of the Roman civil law make a distinction, that if the alienation be perfectly voluntary, the legacy is adeemed; if through a temporary constraint of indigent circumstances, it may remain. Thus they argue;—alienation is an ademption only because it manifests a change

<sup>o</sup> Dig. l. xxxiv. t. 4. le. 18.

<sup>p</sup> Dig. l. xxxiv. t. 4. le. 15.

<sup>a</sup> Gab. confil. c. iii. § 13.

<sup>r</sup> L. xxxiv. t. 2. le. 6.

<sup>1</sup> Dig. l. xxxii. de leg. 3. le. 11. § 12.

of intention in the testator, and so amounts to an implied revocation: if such alienation can be accounted for on other grounds, the former presumption is forestalled. Yet the justness and forensic practicability of this distinction may reasonably be called in question: and it may be better to agree with those 'civilians, who, avoiding distinctions difficult in proof and in practice, indiscriminately hold alienation to adeem. It is manifest, that, to lay a foundation for inferring this kind of ademption, it is necessary first to shew that the legacy is of the specific kind. We have before seen, that stock in the public funds, bequeathed as belonging to the testator, is the subject of a specific legacy. This, therefore, "if sold out by the testator, forms  
one

<sup>1</sup> Dom. civ. l. b. iv. t. 2. § 11. parag. 13.

<sup>2</sup> 2 Bro. 111, 2. Hodgson and another v. Campbell and others in chancery, 12 July 1776.—The testator left "the sum of £.100, part of his stock in the joint stock of £. 3. 10 s. per cent. bank annuities, 1756, upon trust" &c. sold out and bought three per cents; and then made a codicil, but without noticing this legacy: it was holden not to be adeemed; some stress being laid, that the three one half per cents being reduced to three per cents, in the mean while, it was one aggregate fund, and this selling out, and buying in, was with a view of making some little advantage, not with a view of adeeming the legacy; and ademption depends upon intention.

His lordship doth declare, "that the legacy of £. 1000, devised to the said B. Spearman, in trust for the said defendant R. Spear-

one of the most common instances of this kind of ademption.

To this same sort of ademption may be referred bequests of debts due and owing to the testator, and which he afterwards receives<sup>2</sup> in his lifetime. For this may be considered as a destruction or annihilation of such a specific legacy: *extinguitur<sup>1</sup> ipsa constantia debiti*. Here again the civilians distinguish: voluntary payment by a debtor was said not to adeem, because the testator was merely passive. But<sup>2</sup> if he call in his demands, such agency in him has generally been thought, both by their tribunals and our own, fatal to the legatee. This distinction, however, <sup>1</sup> has been

man, was not adeemed by the said testator's transferring the £.2700, out of which the same was to be paid from the joint stock of £.3. 10 s. per cent. annuities into the 3 per cent. consol. annuities, more especially as the said testator has, by a codicil, made subsequent to such alteration of his property, ratified and confirmed his will." Reg. A. 738. a.

<sup>2</sup> See Cartwright v. Cartwright, appendix, case the second.

<sup>1</sup> Dig. l. xxxii. de leg. 3. le. 11. § 13.

<sup>2</sup> 1 Eq. ca. abr. 302. C. T. T. 228. 2 Wms. 165. 330, 1. Ambl. 402. Swinb. 548. (ed. 1743.) Dig. l. xxxii. de leg. 3. le. 11. § 13. "*Cum tamen quidam nomen debitoris exegisset, & pro deposito pecuniam habuisset, putavi fideicommissi petitionem superesse: maxime, quia non ipse exegerat, sed debitor ultro pecuniam obtulerat, quam offerente ipso non potuit non accipere.*"

<sup>1</sup> 1 Wms. 464. 2 Wms. 470, 1. 3 Wms. 386. Ambl. 569. 2 Vez. 624. 2 Bro. 110 &c.—Receiving part of a debt under a commission

been often questioned, if not overruled; because the testator might sue for or call in a debt, bequeathed to a particular legatee, from an apprehension that such debt was in danger by reason of the insolvency of the debtor, and not *animo legatum adimendi*.

2. What may be considered as the second sort of ademption happens, where the testator is a debtor of the legatee; tho this is only saying, that the legacy shall be taken in satisfaction of the debt, and not construed accumulatively; so that these cases might have fallen under a former division of this lecture. The present kind of ademption is also taken from the civilians, whose maxim is, "*debitor non præsumitur donare.*" "Length of time (said<sup>b</sup> lord Hardwicke) will not suffer it to be shaken now, as it is become the fixed rule of property; yet the maxim, *debitor non præsumitur donare*, would not hold, if it were to be reconsidered; for the court has always

commission of bankruptcy, as a first dividend, has been determined no ademption of the debt bequeathed, and the legatee were authorised by the decree to receive the future dividends. (2 Bro. 108 &c.) But it has since been decided, where legacies were left out of a debt due to the testatrix, which debt was discharged in her lifetime, that the legacies were not due. (3 Bro. 431, 2.)

<sup>b</sup> 3 Atk, 68,

shewn

shewn some dissatisfaction at the rule, and endeavored, if there were any room to do it, to distinguish cases out of it." And long before the case, in which this opinion was pronounced, lord chancellor Harcourt <sup>c</sup> had declared a similar aversion, when a testator professes, that he is giving a legacy, for the court to contradict him and say, that he is paying a debt. Nevertheless it is admitted as a general principle of ademption, that where a legacy either exceeds the debt due from the testator to the legatee, or is equal to it, that is, where there is a debt due in the testator's lifetime, contracted before the date of his will, and nothing but a plain general legacy given to the creditor, the rule shall prevail, and such bequest shall be construed a satisfaction of the debt. But if the debt be contracted after the date of the will, there is no pretence to look upon a legacy as payment of it. If the legacy be less than the debt, it never was holden to go in satisfaction; no <sup>d</sup> part of a legacy shall be applied towards satisfaction of a debt, being larger than the bequest, except where the intent appears by other circumstances. So there shall be no ademption, if the devise be

<sup>c</sup> 2 Sal. 508.<sup>d</sup> 2 Vern. 478, 9. adm. 1 Sal. 155.

of land, which is of a different nature and estimation in the law. Farther, \* if the legacy be upon condition, the rule of ademption shall not prevail, for by the breach the legatee may be a loser, whereas the will intended it for his benefit. Lastly, † if the debt were upon an open and running account, betwixt the testator and his creditor, so that it might not be known to the testator, whether he really was indebted or not, then the testator could not intend the legacy to be in satisfaction of a debt, which he did not know that he owed.—The doctrine of ademption, the last proposed head of our inquiries, depends upon the testator's intention ; and what I have selected is meant as auxiliary authorised modes of expounding that intention.

I have now filled up the plan of these disquisitions, according to the delineation thereof, at the end of my preliminary discourses, intitled, “elements of jurisprudence,” where I have also stated the reasons and principles of my general design. To the observations there made on the study of the laws of Eng-

\* 2 Sal. 508. See 1 Atk. 428.

† 1 Wms. 299.

land,

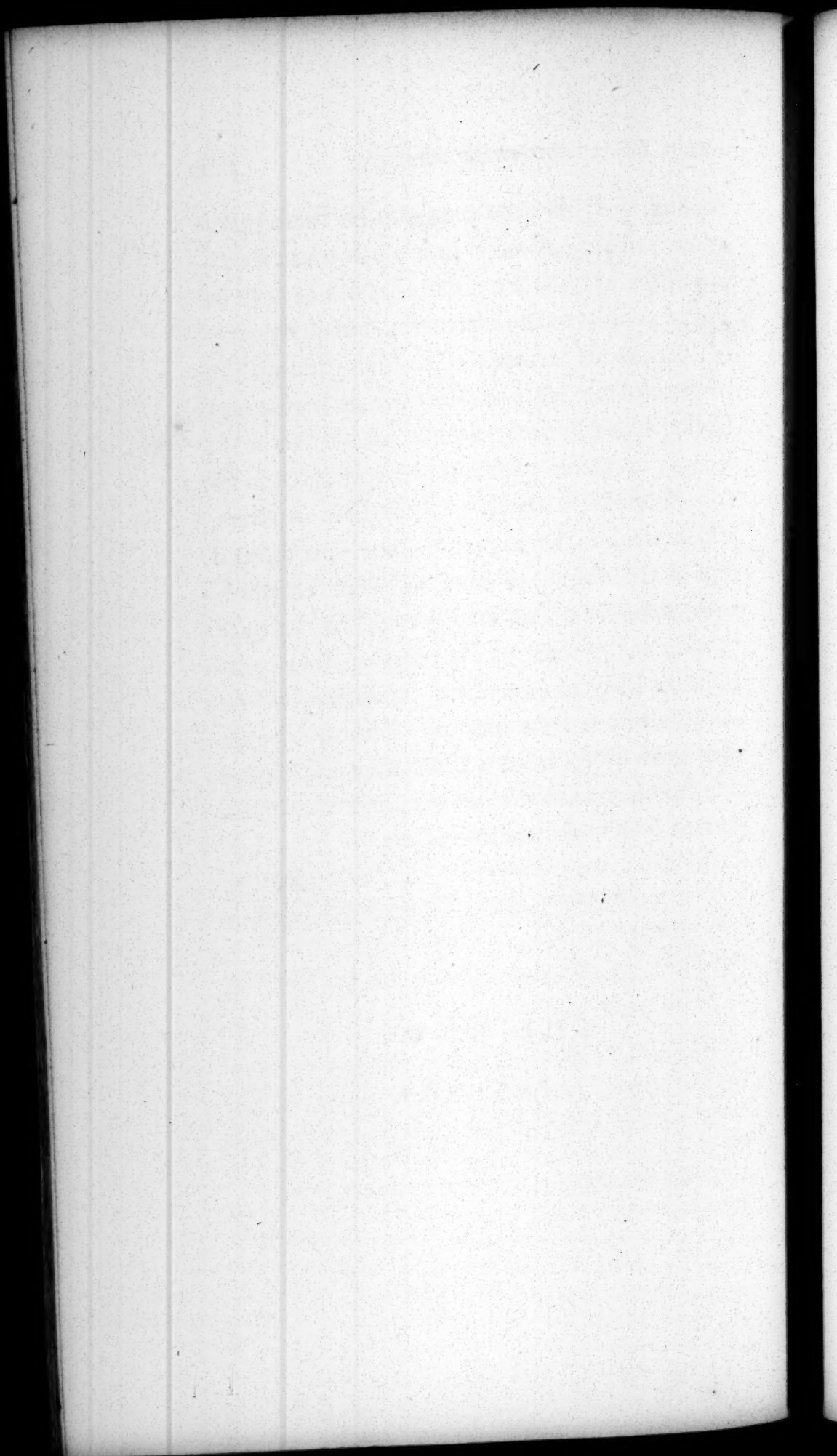
land, I shall beg leave to add, (among various considerations that occur on that subject) that the means of acquiring a competent degree of municipal jurisprudence, exclusive of the advantages (if any) which may (now) be derived from this institution, are of three sorts, private diligence and attention, conversation and communication with others, (which assistance sir Edward Coke<sup>a</sup> much recommends) and attendance on the courts of justice. The laborious<sup>b</sup> Spelman describes the study of our laws to be "*molem non ingentem solum, sed PERPETUIS humeris sustinendam.*" On which words if I were to comment, I should infer from them the necessity of continued and unremitted application. And indeed I am persuaded, that the same portion of well spent time and of actual reading in the juridical profession will be of much greater avail, if it be compressed within the compass of a few years, than if it be spread and distributed through a longer space, in a more desultory course of study. As to attendance on the courts of justice, tho the student's time there may be most usefully employed, for a little practical experience often countervails much

<sup>a</sup> 1 Inst. 264. 2.<sup>b</sup> Pref. to Gl.  
reading,

reading, yet his time may also be there miserably wasted. A very imperfect understanding of the cases there agitated will not only be barren of improved cultivation, but productive of pernicious errors. On this ground the practice of the learned Plowden is highly deserving of imitation; who, <sup>1</sup> as he sets forth by way of useful admonition, acquainted himself beforehand with the subject matters, which were to be argued in the courts, and studied the points of law. I shall conclude with following the example of sir Edward <sup>2</sup> Coke, at the close of his very valuable comment on Littleton's tenures, in wishing to the students of our laws increase of knowledge in their profession, from which they will derive abundant honor to themselves, and render important benefits to their country.

<sup>1</sup> Pref. comm.<sup>2</sup> 1 Inst. ad. fin.

THE END.



## A P P E N D I X.

*The following cases, in the two former of which I was of counsel, being too long for insertion in the notes (as hath been done in some other instances) are here subjoined.*

## CASE THE FIRST.

John Cull, and Frances his wife, and William  
 Hay - - PLAINTIFFS.  
 Jane Showell, widow, J. J. Showell, Stephen  
 Frith, J. Dickerson, F. Burton, and the  
 South Sea Company - DEFENDANTS.

In Chancery, 22 & 23  
 days of June 1773.  
 Ambl. 727 &c. S.C. } **T**HE bill stated, that Hen-  
 rietta Walraven seised in  
 fee, or having power to dispose of certain copyhold  
 estates, after giving some specific and pecuniary lega-  
 cies, gave the residue of her personal estate to her ne-  
 phew John Showell, and *in pursuance of the power*  
*given her for that purpose*, appointed the copyholds to  
 John Showell in strict settlement; remainder to  
 Peter Walraven for life; remainder to the plain-  
 tiff Frances, in strict settlement; remainder to the  
 testatrix's cousin, Ann Hay, (late mother of the  
 plaintiff W. Hay,) and her heirs for ever; and  
 appointed John Showell sole executor. And the bill  
 charged, that by proving the will of the said H. W.  
 5 and

and taking the beneficial interest thereby given in the residue of her personal estate, John Showell *determined his election* to take the copyhold premises under her will as tenant for life only: and that it was the manifest intent and design of the said testatrix to make the said John Showell a recompence and satisfaction for only giving him an estate for life in the said premises, by giving him the whole residue of her personal estate; and which, without his having elected to take it as aforesaid, would have been distributable between the plaintiff Frances and the other next of kin; and that it was likewise the design of the testatrix to make her next of kin, and particularly the plaintiff Frances, and the said Ann Hay, deceased, a proper satisfaction for the loss of their shares of such personal estate by giving them respectively a greater \* interest in the copyhold premises than she had given to the said John Showell, and therefore he took no other or greater interest than what was devised to him: and that he possessed himself of the personal estate to the amount of £. 1000, and £. 1400 new south sea annuities: and the bill prayed, that the defendants might discover their title, and that the copyholds might be surrendered to the plaintiff Frances, and she quieted in possession, and an account of rents and profits.

The answer set forth, that Peter Walraven (the husband of the testatrix H. W.) was admitted tenant in fee of the copyholds, and having surrendered

\* This however was not true as to the defendant Frances.

to the use of his will, devised as follows: "I give to my dear wife H. W. all the lands, houses, timber, underwood, and goods belonging to me in the parish of C. in the county of S. for her natural life, and after her decease to the said John Showell, by the name &c. on condition that he pay to his mother El. Showell £. 30 per annum as long as she shall live: *the remaining part of my estate I give to my loving wife H. W. to be disposed of as she shall think fit*; and appointed her his sole executrix. By virtue of which will John Showell (as was alleged) took an absolute estate in the said copyhold premises, subject to the life estate of the said H. W. otherwise he or his estate could not have paid the said annuity. Then it set forth the admittance of John Showell, in such admittance described as "nephew and heir at law of Peter Walraven, and devisee in the several wills of P. W. and H. W.: that H. W. having devised the said premises to the said John Showell, did not strengthen his title thereto, she having no power to devise the same; and the defendant J. J. Showell claimed the said copyhold premises, let at £. 71 a year, under the will of John Showell, who devised the same to Peter Walraven Showell in fee, and who devised the same in trust for the defendant J. J. Showell, charged with an annuity to the defendant Jane Showell.

It did not appear by the bill, who or how many were the personal representatives of the testatrix H. W. nor did it appear by the answer, what legacies she had given, nor in particular one of £. 300 to the plaintiff Frances.

It was argued by the solicitor general, (Wedderburne) serjeant Hill, and Mr. Lane, for the plaintiffs, and by the attorney general, (Thurlow) myself, and Mr. Brown, for the defendants.

It was admitted on the part of the plaintiffs, that John Showell, under the will of Peter Walraven, had a remainder in fee expectant on the determination of the life estate of the testatrix H. W. and consequently that she had no *power* of devising; which depended on the annuity payable to El. Showell. [As to this, see the authorities cited, Vol. II. 357.]

But it was insisted, that John Showell should not have taken benefit under the will of H. W. without acquiescing under the will *in toto*, 2 Vern. 581 &c. C. T. T. 176 &c. 1 Vez. 234, 5. They also cited, as to John Showell's having actually determined his election, the case on the duke of Somerset's will, (now reported, Ambl. 657 &c.) before lord Camden, who affirmed lord Northington's decree, after the great case, 6 Bro. parl. ca. 232 &c. [See Ambl. 430 &c. 3 Bro. 88 &c. 255, 6. But the election may be postponed till accounts taken, to direct the party's discretionary judgment. 3 Wms. 124. n. 321. 1 Bro. 187. 446.]

I argued *contra*, that the admission, that John Showell had a fee, independent of the will, went a great way to determine the cause in favor of the defendants. For that, as to putting him to election, the cases were distinguishable from the present.

sent. The intention of the testator must be manifest, as in 2 Vern. 581 &c. The devisor must either have the legal estate, as in C. T. T. 176 &c. or else a proprietary interest and equitable dominion or power of disposing, pursuing legal steps, as in 2 Vern. 581 &c. and 1 Vez. 234, 5. I cited *contra*, 2 Vern. 365, 6. 1 Eq. ca. abr. 218, 9. Then I argued on the *quantum* of the residue of the personal estate, *deductis deducendis*, particularly the £. 300 legacy to the plaintiff, and that if the clear surplus was in any degree inferior to the difference in value between his life estate and an estate of inheritance, it could not be a satisfaction. 2 Vern. 478, 9. As to his having actually determined his election, he claimed to be admitted under three several titles; the plain interpretation of which was, that he would not elect, but left it to the law to determine, which title he might abide by. As to the question of intention, that he was a near relation, as well as heir at law, of Peter Walraven, from whom the real and personal estate came: that the testatrix, H. W. had no very near relations; and therefore the £. 300 legacy was as large as the plaintiff Frances could reasonably expect; and that the testatrix was so far from giving one estate in compensation for the other absolutely, that she observes a sort of proportion in the disposition of both estates, giving a just and reasonable preference to the relations of her husband, for the reason aforesaid, in both, but not excluding her own relations in either. Lastly, there was another point, which alone was sufficient to determine the question;

viz. that H. W. having no power of devising whatever, her will as to the real estate was a mere nullity, and therefore John Showell was not to be put to his election, citing lord Hardwicke's doctrine in *Hearle and Greenbank*, 3 Atk. 715, [suggested to me by Mr. Madocks :] " that where a man executes his will in the presence of two witnesses only, and devises his real estate away from his heir at law, and his personal estate to his heir at law, this being a good will as to the personalty, but void as to the lands, for want of being duly executed, the devisee of the real estate could not compel the heir at law to make good that devise, before he could intitle himself to his personal legacy, because here is no will of real estate for want of proper forms and ceremonies required by law." Therefore there were no grounds of divesting from the defendants their family estate.

Lord chancellor decreed for the defendant without any doubt. He laid great stress on the aforesaid quotation from *Hearle and Greenbank*, and on the length of time, as the bill might have been brought in the life time of John Showell. It was uncertain, what the residue of the personal estate amounted to, and in whose hands it was, or who had any benefit from it: and here was a legacy of £. 300 to the present plaintiff Frances. He admitted that where J. S. leaves the estate of J. N. to a stranger, and at the same time gives J. N. £. 1000, there J. N. shall not have the estate and legacy too, tho it be his own estate, because the testator's *intention is plain* of making a compensation.

tion. But here the testatrix professes to devise in pursuance of her power; therefore if she had no power to dispose of the real estate, (as she clearly had not) she does not devise it. He likewise countenanced the distinction, that I had mentioned, where the deviser had a power of devising, but neglected to surrender to the use of his will as to copyholds, or to levy a fine, or suffer a recovery, as to freeholds, and where he has no devisable interest whatsoever.

## CASE THE SECOND.

Elizabeth Cartwright, widow, and others,  
PLAINTIFFS.

Mary Catharine Cartwright, widow, and  
others, - - - DEFENDANTS.

In Chancery, } WILLIAM CARTWRIGHT,  
8th July 1775. } having otherwise made a considerable provision for his wife, the plaintiff, by a codicil dated 16th Nov. 1765, being the seventh, reciting, "that he had signed articles for sale of his Welch estate for £.1400, bequeathed that sum, when paid, to the plaintiff his wife, and desired that she would dispose of it among her daughters:" and by an eighth codicil, dated 8th April 1766, reciting, "that his sister Armyne Ward, by will gave the residue of her estate to him her executor, to be distributed amongst his children by the plaintiff his then wife, which residue did not exceed £.1520, and that he had directed his bankers to invest £.2000, part of his cash in their hands, in purchases of stock to that amount, he declared such stock should go at his decease amongst his children by his then wife, in satisfaction of their claims to the personal estate of Armyne Ward:" and by a ninth codicil, dated 13th Feb. 1767, reciting, "that he had sold his navigation stock for £. 605, he gave that sum as an additional legacy to his said wife."

In 1761, the testator gave his said wife a cover, in which were inclosed thirteen bank notes of the

value of £.330, and which was directed "To Mrs. Cartwright:" some of the codicils were inclosed in covers; but not so directed. The sum of £.35. 4s. 4d. being deducted for expences out of the £.1400, purchase money of the Welch estate, the residue, to wit £.1364. 15s. 8d. was paid to the testator's bankers, and blended with his other money, no separate account thereof being kept; and the £.605 for the navigation stock was in like manner received in his life time, and applied in common. The bill charged the expenditure was in satisfaction of liens on the real estate, but no attempt was made to establish that case. The testator died the 29th June 1768. Thomas Cartwright, his son by a former wife and heir at law, and who was the late husband of the defendant Mary Catharine Cartwright, proved the will and codicils, as executor. He took the notes of the value of £.330, but brought them back to the plaintiff, saying "they certainly belonged to her, and took a receipt for them. By his answer to the original bill he did not admit personal assets, but said the legacies, if payable, must come out of the real estate charged therewith; the money in the hands of the testator's bankers at his death being reduced to £.234. 10s. 0.  $\frac{3}{4}$ d.

Thomas Cartwright being dead, the suit was revived against the now defendant Mary Catharine Cartwright his widow and executrix, who, among other things, insisted, that in case the plaintiff's demands were allowed, all the benefit her late husband and his family would derive from the said William Cartwright's will, would amount to about

N n 4

£. 1000,

£. 1000, altho her said late husband had consented to defeat his tenancy in tail in remainder in estates of £. 4000 a year.

I argued for the defendants, that the bequests in the 7th and 9th codicils, particularly the 7th, were specific and adeemed. Destruction, or donation, of a thing bequeathed, amounts to ademption by the Roman civil law. "*Si domo destructâ aliam eodem loco testator ædificaverit, dicemus interire legatum.*" Dig. l. xxx. de leg. 1. le. 65. § 2. "*Rem legatam si testator vivus alii donaverit, omnimodo extinguitur legatum.*" Dig. l. xxxiv. t. 4. le. 18. Paul. ad Dig. l. xxxiv. t. 5. le. 15. Goth. ed. declares, "*testator supervivens si eam rem, quam reliquit, vendiderit, extinguitur fideicommissum.*" Mant. de conjec. ult. vol. l. ix. t. 12. affirms, "*si legatum perierit, sine culpâ hæredis, non debetur æstimatio:*" as in case of destruction by fire after the testator's death. The reason of ademption is stronger, where the subject perishes with the testator's concurrence. "*Legatum speciei extinguitur dissolutione, licet ipsa species retineatur:*" (Gabr. consil. ciii. § 13. citing Dig. l. xxxiv. t. 2. le. 6; then follows:) "*difficilius enim extinguitur legatum in genere consistens quam speciei; speciei extinguitur alienatione, quicquid ex ejus pretio faciat testator.*"—Where a legacy is to come out of a particular fund, which fails, the legacy fails also. Thus Mant. de conjec. ult. vol. l. xii. t. 6. § 24, "*illa res, ex quâ voluit testator legatum solvi, adjicitur in eâdem oratione, et tunc, si non apparet, quod aliquam subrogavit in locum illius, quam alienavit, legatum extinguitur; quia censetur, testator eam rem in eâdem oratione posuisse, ut illud legatum ex eâ ipsâ*

*re necessario solvatur.*" 1 Atk. 508. 3 Atk. 0 3.  
[The same doctrine hath since been sanctioned by lord chancellor Thurlow, 3 Bro. 431, 2.] A legacy out of a debt fails, if the debt fails; unless it be a direction merely, how to come at the bequest the sooner: which exception is analogous to the civil law, Mant. ubi supra,—*in diversâ oratione,—ut legatum facilius solvatur.*—Here the testator having once possessed, and having sold, the Welch estate and the navigation stock, is the foundation of the codicils: having spent the purchase money, it is as if he had never owned the funds, from whence it was raised. "The thing is annihilated and gone." 2 Atk. 597. If one bequeath corn in a barn, and consume the corn in his life time, nothing is due, unless the corn is replaced. Swinb. 545. ed. 1743. [By the marg. it ought to be replaced, "*per modum surrogationis.*"]—Suppose the testator's title to his Welch estate had been evicted, or the purchaser had proved insolvent, how do those cases differ from his having spent the money? What he intended to give is perished and gone; it rests with the other side to prove, that he intended to substitute an equivalent. "If a man devise a thing, which he hath not, equity cannot relieve." C. T. T. 152. "Seeing the testator strips himself of it, much more doth he deprive the legatary." Dom. civ. l. b. iv. t. 2. § 11. paragr. 13.

The *form* of the legacy of £.1400 is material: it refers to a time future—"when paid:" such future time must mean a time subsequent to the testator's death, for then a will speaks: (a difference in this behalf

behalf between wills and covenants is noticed, Swinb. 545. ed. 1743.) *when* is conditional, viz. if it then remain a subsisting debt, not received or consumed by me, whilst I live. The manner, in which the very learned Mr. Yorke expresses himself in his opinion on this codicil, tho not to be used in the way of authority, may still serve in the way of illustration to throw light on the subject. "It seems intended as a specific legacy in case he had died before the receipt of it, but eventually there has been an ademption." Such conditional bequests are subject to eventual extinction. Dig. l. xxx. de leg. 1. le. 5. § 1. and le. 6. and l. xxxiv. t. 2. le. 34. § 2. "*Si quis legaverit rem ita, si mortis tempore ejus erit, nec tunc ejus invenitur, nec æstimatio ejus legari videbitur.*" Dig. l. xxxv. t. 1. le. 33. § 3. "*In hoc igitur textu deciditur legato facto per verbum temporis futuri, quæ eo loco erunt cum moriar, non contineri rem venditam etiam non traditam, si ejus pretium sit acceptum, etiam si necessitate vendita sit, quia ea distinctio non adhibetur in legato concepto per verba futuri temporis.*"—"Quoties igitur verbis non continetur res legata, non debetur, vel voluntate, vel necessitate, alienaverit, et contineri non videtur, cum ejus pretium accepisse testator invenitur tempore mortis, quam legavit per verba, quæ mea erunt vel ibi erunt cum moriar." Gabr. consil. ciii. § 8. "*Per alienationem rei legatæ extinguitur legatum sine distinctione, quando relictum est sub conditione, si mea erit cum moriar.*" Mant. de conject. ult. vol. l. xii. t. 6. § 11.—The distinction between alienation voluntary and because of distress has little foundation in reason. They should both indiscrimi-  
nately

nately adeem. Can there be a stronger reason for implying ademption than the urgent necessity (the civilians' phrase) and indigence of the testator?

"*Si alienatio voluntarie fiet &c. legatum revocatum confetur.*" Mascard. de probat. Concluf. 1281. §

123. 125. "*Etiam necessariâ alienatione revocatur, cum ex eâ pretium non pervenit ad defunctum, nec in ejus patrimonium versum est.*" Gabr. consil. c. iii. §

11. This explains the law, Dig. l. xxx. de leg. 1. le. 96. in præfat. that there should be no ademption, where the legacy was in a distinct clause, and where the patrimony was undiminished, the money being otherwise invested, (*omnes summæ in alios usus translatæ*) and the funds being inserted as a direction, how the legacy at the time of the will might be conveniently raised.—As to debts bequeathed, therefore, it should seem, that by the Roman law, voluntary payment was *primâ facie* no ademption, otherwise if the payment were compulsory; but both cases were open to explanation; in the former, the proof lay on the person claiming the residue, he was to shew, that the money voluntarily paid in, "*in patrimonium non versum est*;" in the latter instance, the proof lay on the legatee, who was to make out, that tho the testator compelled payment, it was not *animo adimendi*, since he laid the money by for the legatee's benefit, *cum pecuniam pro deposito habuisset.*" Dig. l. xxxii. de leg. 3. le. 11. § 13.

[On this question of ademption, most or all of the cases in Wms. Vez. and Atk. quoted in the last lecture, and also the attorney general v. Parkin, since

since reported Ambl. 566 &c. were cited and commented on by both sides.]

I also argued, that the delivery of the bank notes, seven years before the testator's death, did not answer the descriptions of a donation *causâ mortis*. Swinb. 22, 23. ed. 1743. 3 Wms. 356 &c. 2 Vez. 439 &c. Dom. civ. l. b. iv. t. i. § 3. 2 Eq. ca. abr. 573, 4. It seems, he meant at some future time to declare the uses of this mysterious delivery; which may explain his reserve and silence at the time, and his sealing of the cover; he was in the habit of adding codicils; it bespeaks a future executory intention, and not a complete present disposition.

The decree however, amongst other things, declared, “ *the legacies in the seventh and ninth codicils, pecuniary legacies &c.* And as to the claim of £. 330 in bank notes, it reserved the consideration thereof till the plaintiff should have applied to the ecclesiastical court to prove the facts, relative to the delivery of the cover directed to her, in the nature of a codicil. And it was declared that the £. 2000, mentioned in the eighth codicil, was a satisfaction of the claims against the testator William Cartwright, in respect of the personal estate of Armyne Ward &c. And that if there should be any surplus of the personal estate of William Cartwright, the same would belong to the defendant Mary Catharine Cartwright, and if there should be a deficiency, it should be raised out of the real estate of the testator William Cartwright, devised to Thomas Cartwright in fee,  
and

and by the will subjected to the payment thereof.”  
Reg. A. 778.

It appears therefore, that in determining the legacies in the seventh and ninth codicils to be pecuniary legacies, the court considered it to be the intention of the testator, that they should be subsisting legacies, as gifts of *such sums of money*, in point of quantity, tho *in specie* he appropriated or designed those funds for payment.

## CASE THE THIRD.

Griffin, - - - - PLAINTIFF.  
 De Veulle and others, - - DEFENDANTS.

In Chancery,  
 decreed 16th  
 Nov. 1781. } THE plaintiff was a young  
 gentleman of fortune in Ja-  
 maica, which estate there was under the ma-  
 nagement of a Mr. Bond, whose consignee in  
 England, another Mr. Bond, placed the plain-  
 tiff in the family of the defendant, at £.60 a  
 year, and £.30 for the plaintiff's brother. Their  
 sister intermarried with the defendant. The plain-  
 tiff having in a short time incurred considerable ex-  
 pences and debts, Bond asked De Veulle, what  
 would be the full expence of the plaintiff's being  
 maintained in his family, he asked £.400 a year,  
 but being told that was exorbitant, it was agreed to  
 be £.200 a year, in expectation (as the lord chan-  
 cellor observed in decreeing) that nothing extra  
 would in future be incurred. Yet £.1300 was  
 afterwards demanded for debts incurred partly by  
 the plaintiff and partly by the defendant. The de-  
 fendant was a bookseller and stationer, but was too  
 embarrassed in his circumstances to continue his  
 trade, and expressed his desire of having a settle-  
 ment from the plaintiff, as having married his sister  
 (intituled

(intitled to but a small portion) and represented the Jamaica estate as worth £. 3000 or £. 3500 a year. The plaintiff consented by letter to settle an annuity on the defendant and his wife of £. 300, to abate in proportion of £. 20 per cent. if there should happen to be any diminution in the value of the estate, and if that should be lost, then to sink entirely. Accordingly, soon after the plaintiff came of age, he settled annuities of £. 100 a year apiece on the defendant and his wife till the ensuing December, then to be £. 150 apiece, with benefit of survivorship, and after their decease, the whole £. 300 a year for the issue of the marriage for their lives. An action of covenant had been brought for £. 75 in arrear. The bill therefore prayed an injunction, and that the deed should be delivered up to be cancelled, being founded on fraud and misrepresentation, and considering the defendant as a guardian taking this advantage of his pupil just at his age of majority.

Many cases were cited, particularly *Osmond and Fitzroy*, 3 Wms. 129 &c. *Hylton and Hylton*, 2 Vez. 547 &c. and *Cray and Mansfield*, 1 Vez. 379 &c. [See as to the consideration of fraternal affection to raise a use, Pl. 309.]

The lord chancellor admitted, that this court would not set aside the voluntary deed of a weak man, who is not absolutely *non compos*, nor any deed of improvidence or profuseness, for these reasons merely, where no fraud appears; as was laid down by sir Joseph Jekyll, in *Osmond and Fitzroy*; but he said, that sir Joseph Jekyll might have been pleased

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 ment from the plaintiff, as having married his sister  
 (intituled

(intitled to but a small portion) and represented the Jamaica estate as worth £. 3000 or £. 3500 a year. The plaintiff consented by letter to settle an annuity on the defendant and his wife of £. 300, to abate in proportion of £. 20 per cent. if there should happen to be any diminution in the value of the estate, and if that should be lost, then to sink entirely. Accordingly, soon after the plaintiff came of age, he settled annuities of £. 100 a year apiece on the defendant and his wife till the ensuing December, then to be £. 150 apiece, with benefit of survivorship, and after their decease, the whole £. 300 a year for the issue of the marriage for their lives. An action of covenant had been brought for £. 75 in arrear. The bill therefore prayed an injunction, and that the deed should be delivered up to be cancelled, being founded on fraud and misrepresentation, and considering the defendant as a guardian taking this advantage of his pupil just at his age of majority.

Many cases were cited, particularly Osmond and Fitzroy, 3 Wms. 129 &c. Hylton and Hylton, 2 Vez. 547 &c. and Cray and Mansfield, 1 Vez. 379 &c. [See as to the consideration of fraternal affection to raise a use, Pl. 309.]

The lord chancellor admitted, that this court would not set aside the voluntary deed of a weak man, who is not absolutely *non compos*, nor any deed of improvidence or profuseness, for these reasons merely, where no fraud appears; as was laid down by sir Joseph Jekyll, in Osmond and Fitzroy; but he said, that sir Joseph Jekyll might have been  
pleased

pleased to add, that from these ingredients there might be made out and evidenced a collection of fact, that there was fraud and misrepresentation used. The case of Osmond and Fitzroy cannot be supported but on the mixed ground, of lord Southampton's extreme weakness of understanding, as well as the situation of Osmond. So as to gifts to a guardian from his ward on coming of age, the court has thought the influence of that relation so great, and that it was so difficult to prove the various means of unduly exerting it, that in general such gifts are not valid. But a guardian may, as Mr. Mansfield did much to his honor, (1 Vez. 379 &c.) excuse himself from such suspicion, and reap the advantage of intended bounty. It is possible therefore that such gifts may be good. His lordship commented on the disagreement between the instructions in the letter, and the deed. By the one, the annuity was to be £.300 at a time that the plaintiff considered the estate £.3000 a year, and to abate &c. so that it was a tenth part of the whole: by the other, it was not to abate till the estate fell to £.1500, consequently it was one fifth. There was also in proof a disagreement between the original agreement and the deed, respecting the limitation of the annuity to the issue of the marriage. The annuity was valued at £.2500, and it was by the deed redeemable for £.3500, which money was to be disposed more favorably to De Veulle, than the annuity as limited. [I suppose the lowness of the valuation depended on the contingent abatement.] The estate was now *communibus annis* £.430 or thereabouts. [There was a suit in the chancery of Jamaica respecting a large

large jointure charged on the estate by a former proprietor.] As to its being objected, that relief might be had in an action of covenant at law, respecting the provisional abatement, his lordship observed, that the deed very improvidently exposed the plaintiff to discover his estate, which shewed his ignorance and incompetence for such transactions. It was urged, that there was no *suppressio veri*, or *suggestio falsi*, by De Veulle, and that he did not know, that the estate was not worth £.3000 a year. But the lord chancellor said, he at least did not know, that it was worth so much, and yet hazarded the representation. The circumstances of this case, and the situation of the parties, collectively, shewed that the plaintiff was deceived, abused, and circumvented, and therefore the deed was declared void as being obtained by fraud, and the injunction, which had been obtained, made perpetual; and the plaintiff was to pay the two defendants, the trustees in the deed, their costs, which were to be repaid to him by the defendant De Veulle, and no costs were given as among the other parties.

THE END. J. K. September 9<sup>th</sup> 1822

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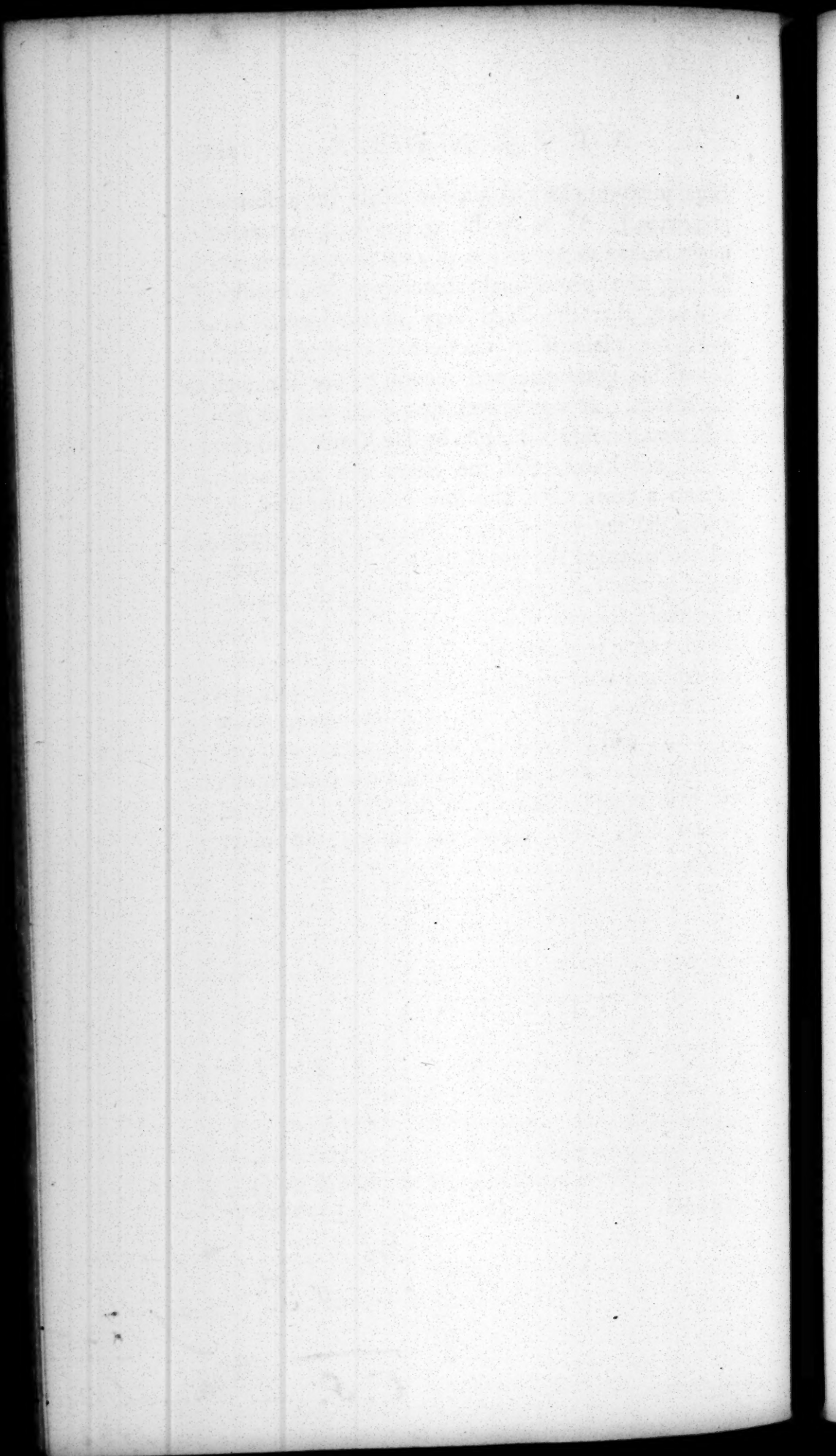
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